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# Law Enforcement Newsletter

Office of the Attorney General  
for the Commonwealth of Massachusetts



GOVERNMENT DOCUMENTS  
COLLECTION

Scott Harshbarger  
Attorney General

(617) 727-2200

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## LETTER FROM THE ATTORNEY GENERAL

### Legislative Priorities for 1997

#### I. INTRODUCTION

Welcome to the latest edition of the Law Enforcement Newsletter. This issue features important information regarding the new state and federal laws relating to firearms and domestic violence, arson prosecutions, the Alcoholic Beverages Control Commission, victim compensation, the sex offender registry, and the collateral consequences of pleading guilty on immigration status.

Before presenting that news, however, I want to outline some of my legislative priorities for 1997 and ask for your support to win their passage in this year's session.

#### II. CRIMINAL JUSTICE SECRETARIAT

Strengthening the criminal justice system in Massachusetts has been a primary goal of mine for the past 15 years, both as District Attorney for Middlesex County and now as Attorney General for the Commonwealth. As Attorney General, I have actively pursued effective and creative ways to help combat urban violence and stem the tide of drugs infiltrating our neighborhoods. My office started the Safe Neighborhood Initiative in partnership with the Suffolk County District Attorney's Office, the Mayor of Boston's Office, Boston Police Department, and numerous dedicated community activists. My Narcotics Division regularly conducts sweeps of drug-ridden areas, getting dealers off our city streets.

But we need to do more to keep our streets and communities safer. The legislation that I am proposing is intended to do just that.

I am proposing that the Probation Department join the other law enforcement agencies currently under the jurisdiction of the Executive Office of Public Safety. By so doing, we would be ensuring that all the various criminal justice agencies in the state

are part of one law enforcement organization. Our new secretariat would then be able to provide for more accountability in the system, and ensure more effective and efficient supervision of defendants in the Commonwealth.

How many times have we heard about an individual who is placed on probation, and then commits a new offense? All too often, the probation surrender hearing process takes several months to be completed, and during that time, the probationer remains on the street committing more crimes and rendering more neighborhoods unsafe. My proposal is to provide the Probation Department with the tools to swiftly take probationers who violate the conditions of their probation agreements off the streets, and to then impose meaningful consequences. We want our probationers, particularly the younger ones, to fully understand that if they are lucky enough to be given a chance to avoid incarceration and be placed on probation, they are going to be watched and monitored and supervised as closely as humanly possible. And each person placed on probation is going to know that if he or she commits a new crime, or violates any condition of the probation agreement, that probationer is going to face incarceration. By moving the Probation Department into an executive agency, we will enhance our ability to render swift and certain the consequences of violating a term of probation.

### **III. ASSAULT WEAPONS BILL**

As you know, I sponsored an assault weapons ban that came very close to passing last year. We must convince our legislators that we need a statewide assault weapons ban in Massachusetts. Assault weapons are what gangs use to kill law enforcement personnel, they're what kill innocent children caught in cross-fires, and they're the weapons of choice of many other dangerous individuals. My office is once again filing the assault weapons bill and we urge our senators and representatives to approve the bill and help our state take another step toward safer streets.

### **IV. FIREARMS IDENTIFICATION REFORM**

I have also refiled An Act Relative to Firearms, with Senator James Jaguga, Representative Paul Caron and the Massachusetts Chiefs of Police Association. This bill contains vitally needed reforms of our firearms licensing laws, and the state's firearms recordkeeping system, which are both seriously out of date, and dangerously out of sync with the current level of gun violence. The changes proposed in this bill will strengthen our gun laws and eliminate major gaps which require police chiefs to issue gun permits to convicted criminals, even those who have been convicted of violent felonies, and individuals who are forbidden under federal law from possessing guns. The bill also establishes a trust fund to support the firearms recordkeeping system, which will help bring this system up to date and maintain it, so that police can have instant access to accurate information about who is authorized to possess firearms.

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## **V. DRUNK DRIVING AMENDMENTS**

Each year, thousands of people are killed by drunk drivers. Hundreds of others are crippled or injured because of alcohol-related accidents. Our drunk driving laws need to be strict as well as strictly enforced. This year, I sponsored a bill that would amend the current drunk driving laws to restrict hardship licenses to a maximum of 12 hours a day. In addition, my bill proposes that for a first offense, an individual could not receive a hardship license for six months rather than the three months currently allowed by statute, and for a second offense, a hardship license could not be issued for a period of one year, as opposed to six months. Finally, my bill eliminates the provision which allows individuals who refuse to submit to a breathalyzer test as well as a field sobriety test, to have their license restored when the criminal charges are dismissed or upon an entry of not guilty.

## **VI. WITNESS PROTECTION PROGRAM**

In response to the growing number of witnesses and victims who are harmed or intimidated during criminal trials and investigations, I have proposed legislation which would establish a formal Witness Protection Program in Massachusetts. The program, which would be available on an equal basis to police and prosecutors throughout the Commonwealth, would be overseen by a panel comprised of a municipal police chief, two district attorneys, the Colonel of the State Police, and my office. The program, which will be funded by small percentages of forfeited bail deposits and assets seized from drug and gaming activities (the bulk of which will continue to be distributed to state and local law enforcement), will provide the services necessary to protect our witnesses and victims and ensure their cooperation at trial.

## **VII. FRIVOLOUS INMATE LITIGATION**

Once again, I've filed legislation to curb the amount of frivolous inmate litigation filed against the Commonwealth. Last year, we conservatively estimated that the Commonwealth spent \$1.5 million to defend against these frivolous suits. To conserve the resources of the Commonwealth in defending against these type of suits, my bill would require: 1) administrative review of any inmate complaint prior to allowing court action; 2) proof of indigency by inmates before allowing a waiver of court fees and costs; and 3) reduction in earned good time credits for up to 60 days for any inmate who has provided false information as to indigency or whose complaint is deemed frivolous by the court.

## **VIII. CRIMINAL BILLS FILED**

This year, I sponsored several bills in the hopes of having new laws enacted which would further protect citizens and, in one instance, help preserve scarce police resources. Some of the key bills are as follows:

- Rohypnol and Gamma Hydroxy Butyric Acid. Establishes that two "date rape" drugs commonly known as "Roofies" and "GHB" are classified as Class A controlled substances. Roofies and GHB are being slipped into drinks, causing a heavily sedated state. Women are increasingly becoming victims of sexual assaults related to the unknowing ingesting of these drugs. This bill would categorize both Roofies and GHB, for the first time, as a controlled substance and increase penalties for use of these drugs during the commission of a rape or kidnapping.
- DNA. Declares the process by which DNA is tested to be scientifically reliable and renders the DNA test results admissible in all civil and criminal trials provided that the tests are performed by a qualified expert. This bill would obviate the need to have lengthy and comprehensive hearings on the admissibility of DNA test results on a case-by-case basis, preserving judicial economy as well as the Commonwealth's resources.
- False 911 Calls. Criminalizes the making of prank 911 calls where an emergency response team is sent to investigate. Police and fire departments currently receive thousands of hoax 911 calls a year. This bill would spare the precious resources of police and fire departments throughout the state.

## IX. CONCLUSION

My staff and I are diligently working on issues critical to those of us involved in law enforcement in Massachusetts. I look forward to the time when I can announce that our bills have been enacted into law.

In closing, I have a few other news items which might be of interest to you. First, I have a new chief in my Criminal Bureau. Fran McIntyre, formerly an Assistant District Attorney in the Plymouth and Norfolk District Attorneys' Offices, has joined my office, replacing Mike Cassidy who is now Associate Dean of Boston College Law School. Fran brings with her a wealth of prosecutorial experience, incredible energy, and a host of ideas on ways to improve our criminal justice system. I hope you'll find an opportunity to meet her.

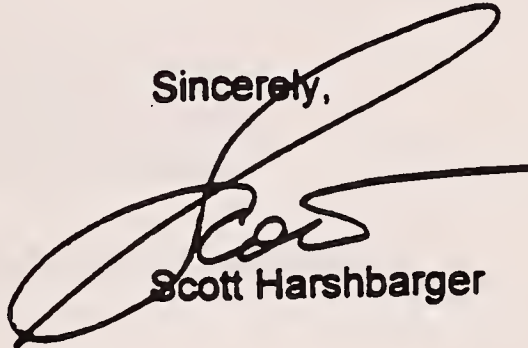
Second, as many of you know, the funding for the COPS federal community policing program may run out in 1998 in most cities and towns. That means that many of our local municipalities will no longer have federal funding to support cops on the streets. We all know that our neighborhoods are kept safer because more officers are visible to the communities, and particularly to gangs. I recently sent a letter to Congressman Delahunt on this issue, encouraging him to lead the fight for more funds. My office needs to hear from you about what the ending of COPS money will mean to your community policing efforts, and what we can do to continue the tremendous gains we have made up to now.

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As always, I want to hear from you with any questions, comments or suggestions you have concerning the legislation and initiatives my office is undertaking. Continue the great work you're doing in helping protect the citizens of our Commonwealth.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Harshbarger', with a large, sweeping loop at the end.

Scott Harshbarger



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## STATE AND FEDERAL LAWS RELATING TO FIREARMS AND DOMESTIC VIOLENCE

### QUESTIONS AND ANSWERS FOR POLICE

Carolyn Keshian  
Assistant Attorney General  
Family and Community Crimes Bureau

**T**he federal Omnibus Consolidated Appropriations Act of 1997, which became effective on September 30, 1996, amended the Gun Control Act of 1968 to prohibit a person from possessing a firearm if he or she has ever been convicted of a *misdemeanor involving domestic violence*. The law specifically applies to government officials and law enforcement officers. We have received many inquiries about the impact of this new law in Massachusetts.

The Act (also known as "(g)(9)")<sup>1</sup> is the most recent in a series of state and federal laws aimed at addressing the volatile combination of firearms and family violence. These laws, restricting firearms licensing, possession, and transfer, are complex and have generated many vexing questions for local law enforcement officers. We first began providing questions and answers for police on firearms and domestic violence in an LEN article in 1994, after the enactment of specific firearms restrictions in G.L. c. 209A. These restrictions essentially require a judge issuing an emergency or temporary restraining order to order the defendant to immediately surrender all guns and ammunition he possesses, as well as any firearms identification card and license to carry he holds, to the appropriate law enforcement officials.

In this article, we have updated and revised the material from 1994, and have focused on the questions most commonly asked of (g)(9). We have attempted to answer questions as best we can at this time; however, some issues will require additional clarification, and work is being done on several fronts to quickly provide useful information. Individuals on the federal, state and local levels, including members

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<sup>1</sup> Although the Act did amend other sections of the law, it is referred to herein as "(g)(9)" because the central provision of the Act appears in 18 U.S.C. § 922 (g)(9).

of the Attorney General's staff, representatives of ATF, the Massachusetts Chiefs of Police Association, the Executive Office of Public Safety's Firearms Division, and others are working together to provide detailed and on-going guidance and suggested protocols for police on this subject. We will keep you apprised of these efforts and distribute material as soon as possible. Given the breadth and complexity of the issues raised, we also remind Chiefs of Police to consult with your town counsel/city solicitor, as necessary.

## **LEGAL SUMMARY**

### ***I. MASSACHUSETTS LAW***

#### ***A. Disqualifying Criteria for Issuance/Revocation of a Mass. Firearms Identification Card (FID) - G.L. c. 120, § 129B***

- \* This law provides that a licensing authority may only decline to issue an FID card (for possession of a firearm, rifle or shotgun) if one or more of the disqualifying criteria listed in the statute exist. The disqualifying criteria prohibit issuance of an FID card to a person who:
1. Has been convicted within the last five years of a felony in any state or federal jurisdiction or within that time has been released from confinement for such conviction; or
  2. Has been confined to any hospital or institution for mental illness, except where the applicant submits an affidavit of a registered physician that he is familiar with the applicant's history of mental illness and that the applicant is not disabled by such illness in a manner which should prevent his possessing a firearm, rifle or shotgun; or
  3. Has within the last five years been convicted of a violation of any state or federal narcotics or harmful drug law, or has within that time been released from confinement for such conviction; or
  4. Is under the age of 15 at the time of application; or
  5. Is 15 years of age or older but under the age of 18 at the time of application, unless the applicant submits a certificate of his parent or guardian granting the applicant permission to apply for a card; or
  6. Is an alien; or

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7. *Is currently the subject of a suspension and surrender order issued pursuant to G.L. c. 209A, § 3B.*

\* An FID card is valid for life, unless suspended or revoked upon the occurrence of any of the above mentioned conditions.

## ***B. Disqualifying Criteria for Issuance/ Revocation of a Mass. License To Carry Firearms - G.L. c. 140, § 131***

\* This law disqualifies an individual from carrying a firearm if the person :

1. Has been convicted of a felony; or
2. Has been convicted of an offense involving the unlawful use, possession or sale of a narcotic or harmful drug; or
3. *Is currently the subject of an order issued pursuant to G.L. c. 209A, § 3B; or*
4. Is a minor under the age of 18; or
5. Is an alien; or
6. Is not found to be a suitable person to be so licensed and does not have good reason to fear injury to his or her person or property, or any other proper purpose, including the carrying of firearms for use in target practice only, by the licensing authority.

\* A license to carry is valid for five years.

\* A license to carry is revocable for cause at the will of the licensing authority.

## ***C. Firearms Provisions of the Abuse Prevention Act - G.L. c. 209A, §§ 3B and 3C***

\* Requires a judge to order a defendant to immediately suspend any firearms permits and surrender any firearms if a plaintiff who is seeking an emergency or temporary abuse prevention order demonstrates a substantial likelihood of immediate danger of abuse by the defendant.

\* Law enforcement officers must take immediate possession of all weapons and permits in the control, ownership or possession of the defendant.

- \* Failure to surrender firearms or firearms permits in response to the court's order is a criminal offense, punishable by up to two and one half years imprisonment.
- \* Police are *mandated* to make an arrest when they have probable cause to believe that a defendant is in possession of firearms or firearms permits and is failing to surrender them in response to the court's suspension and surrender order. **(This change, effective November 7, 1996, eliminates the need for police to obtain a criminal complaint and arrest warrant and makes the process for enforcing a violation of a suspension and surrender order comparable to that for other criminal violations of abuse prevention orders.)**

## ***II. FEDERAL FIREARMS PROVISIONS***

### ***A. The Gun Control Act of 1968, 18 U.S.C. § 922 (g) (1) - (9)***

Three important provisions of federal law are particularly relevant to police in Massachusetts. Each of these provisions makes it a federal offense for a person to ship, transfer, possess, or receive firearms (which, as defined under federal law, includes handguns, *rifles and shotguns*) or ammunition, if the conditions set forth in the statute exist.

#### **1. The Person Has Been Convicted Of A Misdemeanor Involving Domestic Violence 18 U.S.C. § 922 (g)(9):**

This provision, which became effective on September 30, 1996:

- \* Prohibits any person convicted of a *misdemeanor* crime of domestic violence from shipping, transporting, possessing, or receiving firearms or ammunition that traveled in interstate commerce.
- \* Makes it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that the recipient has been convicted of such a misdemeanor.

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- \* The defendant must have been represented by counsel or knowingly waived the right to counsel at the hearing on the charge, and the defendant must have had a jury trial, if so entitled, or knowingly waived the right to a jury trial.
- \* These prohibitions specifically apply to law enforcement officers.
- \* The new law applies if a person has been convicted of a misdemeanor crime of domestic violence *at any time*.
- \* The federal definition of "misdemeanor crime of domestic violence" is an offense that:
  - a) is a misdemeanor under federal or state law; *and*
  - b) has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon; *and*
  - c) is committed:
    - by a current or former spouse, parent, or guardian of the victim;
    - by a person with whom the victim shares a child in common;
    - by a person who is co-habiting with or has co-habited with the victim as a spouse, parent, or guardian; or
    - by a person similarly situated to a spouse, parent, or guardian of the victim.

Some examples of Massachusetts misdemeanor offenses that may qualify under the federal law are: assault and assault and battery, pursuant to G.L. c. 265, §13A; permitting bodily injury to a child, pursuant to G.L. c. 265, § 13J; threats, pursuant to G.L. c. 275, §§ 2, 3, 4, *if* use of a deadly weapon is threatened; and violation of a restraining order, pursuant to c. 209A, *if* the conviction is for violation of a *refrain from abuse order*. In every instance, the defendant and the victim must have been in one of the relationships set forth in the definition.

## 2. Abuse Prevention Orders 18 U.S.C. § 922 (g)(8)

This provision:

- \* Makes it unlawful for persons subject to certain court-ordered restraining orders to ship, transport, possess, or receive firearms or ammunition that

traveled in interstate commerce, if the restraining order meets the following criteria:

- a) specifically restrains the person from harassing, stalking, or threatening an "intimate partner";
- b) was issued after a hearing of which the person had notice and at which the person had an opportunity to participate; and
- c) either includes a finding that the person subject to the order represents a credible threat to the "intimate partner" or child of the "intimate partner," or explicitly prohibits the use, attempted use, or threatened use of force against the partner.
- d) "Intimate partner" is defined as: a spouse or former spouse of the person; an individual who is a parent of a child of the person; or, an individual who lives with or has lived with the person.

\* It is apparent that virtually all so-called "permanent" Massachusetts c. 209A orders involving "intimate partners" would meet these criteria, thus rendering it unlawful under federal law for the person subject to them to possess most firearms, regardless of whether possession was lawful under state law.

\* This provision of law does not contain specific language which states that the provision applies to law enforcement officers, and ATF's position is that a law enforcement officer may carry a service weapon while on-duty, or in the performance of official duties.

### 3. Felon-In-Possession 18 U.S.C. § 922 (g)(1)

This provision:

\* Makes it unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess any gun or ammunition. An exception to this section is any conviction for a state offense classified under state law as a misdemeanor and punishable by a term of imprisonment of two years or less. Therefore, every felony in Massachusetts is included within this federal prohibition.

Until very recently, this section applied to any Massachusetts misdemeanor punishable by more than two years imprisonment. However, a recent decision of the

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Court of Appeals of the First Circuit held that a person could not be convicted as a felon-in-possession on the basis of a Massachusetts misdemeanor conviction. U.S. v. Indelicato, 97 F.3d 627 (1st Cir. 1996). As a result of this decision, it is no longer the case that an individual, lawfully licensed to possess or carry firearms under state law, could be convicted as a felon-in-possession in federal court on the basis of state misdemeanor convictions. An individual may still be convicted under this provision if the predicate offense is a felony under state law. U.S. v. Estrella, 104 F.3d (1st Cir. 1997).

- \* This provision of law does not contain specific language which states that the provision applies to law enforcement officers.

## QUESTIONS AND ANSWERS

### *Issuance of Firearms Permits*

1. ***DOES THE NEW FEDERAL PROHIBITION REGARDING MISDEMEANOR CONVICTIONS INVOLVING DOMESTIC VIOLENCE SIGNIFICANTLY ALTER THE OBLIGATIONS OF THE LICENSING AUTHORITY FOR ISSUING FIREARMS PERMITS?***

NO. The licensing authority's legal obligations are not altered by the federal act. The act places prohibitions on the *license holder*. State law regarding the issuance of permits governs the legal obligations of the licensing authority.<sup>2</sup> As always, a licensing authority may determine that an individual is not a suitable person to carry a firearm and deny a license to carry based on a conviction for a misdemeanor offense, including one involving domestic abuse.

2. ***WHAT CAN THE LICENSING AUTHORITY DO IF A PERSON APPLIES FOR FIREARMS PERMITS AFTER HAVING BEEN CONVICTED OF A MISDEMEANOR INVOLVING DOMESTIC ABUSE?***

Massachusetts laws governing the issuance of gun permits does not specifically disqualify an individual on the basis of misdemeanor convictions, except those that involve narcotics offenses. (See I (A) and (B), above.) The prohibitions in (g)(9) and (g)(1) do not alter these state laws. Thus, if an individual is applying for an FID card and has been convicted of a domestic violence misdemeanor but no other disqualifying criteria exist, the licensing authority cannot under state law deny the FID card, even

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<sup>2</sup> Note that this section refers to issuance of gun permits, not the return of firearms to a prohibited person.

though it would be a violation of federal law for the licensee to receive or possess a firearm. If this circumstance exists, we suggest following the practice tip set forth below. The information in this practice tip also applies if the applicant is an ex-felon released from custody more than five years prior to applying for the FID card.

**Practice Tip**

Where there is a direct conflict between Massachusetts gun licensing law<sup>3</sup> (i.e., the authority to deny an FID card) and federal law, we suggest asking the applicant to sign a written form acknowledging that the applicant understands that it is a violation of federal law to ship, transport, receive or possess any firearm, rifle, shotgun or ammunition.

If the applicant is seeking a license to carry firearms, the licensing authority maintains the discretion to deny the license if the applicant is not a suitable person to carry firearms. Criminal record information may be used as a basis for such a denial.

**3. *WHAT SHOULD POLICE DO IF IT IS KNOWN THAT A PERSON IN THE COMMUNITY IS POSSESSING FIREARMS IN VIOLATION OF (G)(9), OR ANOTHER PROVISION OF FEDERAL LAW?***

Federal authorities (the Bureau of Alcohol, Tobacco and Firearms (ATF) and the Department of Justice (DOJ)) are solely responsible for enforcement of these provisions. You may wish to talk to individuals at ATF regarding a process for referring individual cases.

***Impact Of Federal Provision On Law Enforcement***

Of the three federal firearms disabilities listed above, the new federal provision for misdemeanors involving domestic violence, (g)(9), is the only prohibition that specifically applies to law enforcement officers. ATF's position is that 18 U.S.C. § 925 (a)(1), which states that the provisions of the Gun Control Act do not apply with respect to the transportation, shipment, receipt, possession of any firearm or ammunition sold or shipped to, or issued for the use of any Federal or State governmental entity, exempts law enforcement officers from the prohibitions in (g)(9) and (g)(1). This exemption is limited to gun possession in the performance of official duties.

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<sup>3</sup> For several years, Attorney General Harshbarger and the Massachusetts Chiefs of Police Association have filed legislation to strengthen the law regarding issuance of gun permits in Massachusetts, and where discrepancies exist, make it consistent with federal law. Last year, the Legislature's Joint Committee on Public Safety, chaired by Representative Paul Caron and Senator James Jaguga, reported out favorably a bill based upon these proposals, but it was not acted upon before the session ended. The bill has been refiled.

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**4. CAN POLICE WHO HAVE BEEN CONVICTED OF A MISDEMEANOR INVOLVING DOMESTIC VIOLENCE, AS DEFINED UNDER THE FEDERAL LAW, POSSESS OR CARRY A FIREARM WHILE ON DUTY?**

Any police officer who has been convicted of a qualifying domestic violence misdemeanor would violate federal law if she or he possesses or carries a firearm, on-duty or off-duty.

**5. DO POLICE DEPARTMENTS HAVE AN OBLIGATION TO DETERMINE WHETHER OR NOT OFFICERS EMPLOYED IN THE DEPARTMENT HAVE A CRIMINAL RECORD OF MISDEMEANORS INVOLVING DOMESTIC VIOLENCE?**

There is no ambiguity regarding the application of (g)(9) to law enforcement officers, and departments would not be well-advised to allow officers to violate a federal criminal statute. Departments should be in the process of reviewing the criminal histories of their officers to determine whether any of the officers meet the criteria of the federal prohibition.

## Checklist

A criminal history background check should be conducted, and if an officer has a criminal history, an examination of the underlying offense is required to determine whether the offense is a "misdemeanor involving domestic violence." Specifically:

- Is the crime a misdemeanor, i.e., an offense punishable by imprisonment for not more than two and one half years in a house of correction?<sup>4</sup>
- Was the defendant convicted of the misdemeanor offense? (See question 9, below.)
- Is an element of the offense the use or attempted use of physical force, or threatened use of a deadly weapon?
- Is the relationship between the victim and defendant included within the federal definition? i.e., was the offense committed:
  - by a current or former spouse, parent, or guardian of the victim;
  - by a person with whom the victim shares a child in common;
  - by a person who is co-habiting with or has co-habited with the victim as a spouse, parent, or guardian; or
  - by a person similarly situated to a spouse, parent, or guardian of the victim.
- Was the defendant represented by counsel in the case or was the right to counsel knowingly and intelligently waived?
- If the defendant was entitled to a jury trial for the offense, was the case tried by a jury or was the right to a jury trial knowingly and intelligently waived?

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<sup>4</sup> If the conviction is from another jurisdiction, does that jurisdiction characterize the offense as a "misdemeanor?"

**Checklist (continued)**

**IF THE ANSWER TO ALL OF THE QUESTIONS LISTED ABOVE IS "YES" AND THE ANSWER TO THE QUESTION APPEARING BELOW IS "NO" THE PERSON IS SUBJECT TO THE FEDERAL FIREARMS DISABILITY OF (g)(9).**

- Has the conviction been expunged or set aside, or has the person been pardoned, or have the person's civil rights been restored (if ever lost), unless the pardon, expungement or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms?

**6. WHAT CAN A DEPARTMENT DO TO FACILITATE THE PROCESS OF MAKING THE DETERMINATIONS REQUIRED IN THE CHECKLIST?**

It may be advisable for departments to develop a checklist form which sets forth the criteria in (g)(9), and use it to make individual inquiries of department employees. Sample forms are already available, and it is our understanding that others are being developed by the Massachusetts Chiefs of Police Association. The federal law seems to presume that the information necessary to make the determination of whether or not a person is subject to (g)(9) is readily available; however, in Massachusetts this is unlikely, and additional work may be required, including a review of the court proceedings in some instances, to accomplish this task.

Although determinations will need to be made on a case-by-case basis, some misdemeanor offenses to watch for and examine are: **assault and assault and battery**, pursuant to G.L. c. 265, §13A; **permitting bodily injury to a child**, pursuant to G.L. c. 265, § 13J; **threats**, pursuant to G.L. c. 275, §§ 2, 3, 4, *if* use of a deadly weapon is threatened; and **violation of a restraining order**, pursuant to c. 209A, *if* the conviction is for violation of a ***refrain from abuse order***. This list is intended to be a helpful starting point for your inquiries, but is not necessarily an exhaustive list of potentially qualifying state offenses.

Further note that the required relationship between the victim and the defendant set forth in the federal law is not as expansive as our state definition of "family or household member" under c. 209A. Unlike c. 209A which includes a broad range of relationships, such as persons who are or have been in a "substantive dating relationship," all people related by blood, and persons who reside or have resided together in the same household, (g)(9) covers only:

- a current or former spouse, parent, or guardian of the victim;
- a person with whom the victim shares a child in common;
- a person who is co-habiting with or has co-habited with the victim as a spouse, parent, or guardian; or
- a person *similarly situated* to a spouse, parent, or guardian of the victim.<sup>5</sup>

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<sup>5</sup> The law does not clarify what "similarly situated" means in this context.

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7. ***ARE LAW ENFORCEMENT OFFICERS WITH FELONY CONVICTIONS OF DOMESTIC VIOLENCE SIMILARLY PROHIBITED FROM POSSESSING OR RECEIVING A FIREARM FOR PROFESSIONAL USE?***

Because Massachusetts law prohibits any person who has been convicted of any felony from being appointed as a city, town, or district police officer, this situation should not typically arise in this state. See G.L. c. 41, § 96A. However, it should be noted that, although it is an odd result, the prohibition set forth in (g)(9) only applies to misdemeanor convictions of domestic violence. Although the felon-in-possession prohibition of (g)(1) would preclude a "civilian" felon from possessing or receiving a firearm, it does not apply to law enforcement officers who possess firearms in the course of their employment. Note, however, that (g)(1) does apply to felon law enforcement officers who possess firearms for any purpose *other than official duties*.

We recommend that, at a minimum, in these circumstances, care should be taken to ensure that officers with one or more felony convictions do not possess firearms for other than official business such as restricting possession to on-duty time and arranging for the officer to turn in his service weapon at the end of the shift.

8. ***DOES THE LAW REQUIRE A POLICE DEPARTMENT TO TERMINATE LAW ENFORCEMENT OFFICERS WHO ARE SUBJECT TO (G)(9)?***

No. Individuals who are subject to the prohibitions under (g)(9) from possessing or handling firearms or ammunition may lawfully work in any capacity that does not involve possession or receipt of a firearm.

9. ***WHAT QUALIFIES AS A "CONVICTION" FOR THE PURPOSES OF (G)(9)?***

The term "conviction" has been interpreted in analogous contexts under federal law (federal felon-in-possession and armed career criminal cases). These cases indicate that Massachusetts law governs what constitutes a "conviction." U.S. v. Hines, 802 F. Supp. 559 (D. Mass. 1992). "Under Massachusetts law, a 'conviction' is an adjudication of guilt, either by way of the entry of a formal guilty plea or an admission to sufficient facts or after a finding of guilt by jury verdict." Commonwealth v. Gomes, 419 Mass. 630, 632 (1995), *quoting* U.S. v. Hines, 802 F. Supp. 559, 571 (D. Mass. 1992)(emphasis supplied). A "continuance without a finding" is not the equivalent to a judgment or finding of guilt. Santos v. Director of the Division of Employment Sec., 398 Mass. 471, 473 n. 4 (1986), *citing* Wardell v. Director of the Division of Employment Sec., 397 Mass. 433, 435-36 (1986) .

Also note that the law applies to persons convicted of misdemeanor crimes of domestic violence at any time, even if the crime occurred before the effective date of the act.

**10. WHAT RIGHTS DO LAW ENFORCEMENT OFFICERS, OR OTHERS PROFESSIONALS WHO NEED TO CARRY A FIREARM FOR EMPLOYMENT PURPOSES, HAVE ONCE A MASSACHUSETTS RESTRAINING ORDER IS ISSUED AGAINST THEM?**

As a matter of Massachusetts law, if the defendant files an affidavit that a firearm is necessary for the defendant's employment and requests an expedited hearing, then the defendant is entitled to judicial review of the suspension and surrender order within two court business days of the court's receipt of the affidavit and request. At the review hearing, the court will be determining whether return of the items presents a likelihood of abuse to the plaintiff.

The restraining order prohibition of (g)(8) does not preclude a law enforcement officer from possessing a service firearm in the course of his/her employment. The federal law would, however, be violated if an officer subject to a restraining order possesses a firearm while off-duty.

***Return of Firearms***

The most common circumstances under which police will encounter issues regarding the return of firearms will be when firearms have been seized under a suspension and surrender order pursuant to c. 209A. Two issues exist in this area which require caution:

(1) The new federal firearms prohibition specifies that it is unlawful for any person to sell or "*otherwise dispose*"<sup>6</sup> of a firearm or ammunition to any person knowing or have reasonable cause to believe that the recipient has been convicted of a misdemeanor crime of domestic violence; and

(2) Police should not return firearms (return of permits is permissible) to any person who is subject to the prohibitions under federal law absent a court order.

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<sup>6</sup> The law does not clarify what is meant by "otherwise dispose."

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**11. IF AN ORDER FOR THE SUSPENSION OF FIREARMS PERMITS AND THE SURRENDER OF WEAPONS UNDER C. 209A EXPIRES OR THE UNDERLYING ABUSE PREVENTION ORDER IS NOT PURSUED, ARE POLICE OBLIGATED TO RETURN THE WEAPONS?**

The Chief of Police should be aware of each of the provisions of federal law in this article, and the disqualifications under the Massachusetts gun permit provisions, when returning a firearm. Police are frequently confronted with issues regarding the return of guns, often because a suspension and surrender order lasts for the duration of the restraining order, unless the defendant petitions for review and the court vacates the order.

In every case it makes sense for the Chief of Police to conduct a criminal records check on the individual as well as a review of the Domestic Violence Registry, to determine whether other grounds exist that would require or support denying return of the seized items. In terms of federal law, if the defendant has ever been convicted of a felony offense, or a misdemeanor crime of domestic violence, or is the subject of another outstanding abuse prevention order, the Chief may return the individual's firearms permits, but should not return guns in the absence of a court order, **notwithstanding the validity of his Massachusetts gun permit**, because such a defendant would then be in violation of federal law (unless his gun had been manufactured in Massachusetts and never traveled in interstate commerce).

Keep in mind, however, that in cases in which the defendant has a License to Carry, the Chief of Police who issued the License can still look at the underlying conduct to determine whether or not the defendant is a suitable person for a License to Carry. It is thus important to ensure that the appropriate licensing authority is notified.

**12. IF AN ORDER FOR THE SUSPENSION OF FIREARMS PERMITS AND THE SURRENDER OF WEAPONS UNDER C. 209A IS MODIFIED OR VACATED BUT THE ABUSE PREVENTION ORDER REMAINS IN EFFECT, ARE POLICE OBLIGATED TO RETURN THE WEAPONS?**

As in question 12 above, the Chief of Police should be aware of each of the provisions of federal law listed above, and the limitations under the Massachusetts firearms permit provisions when returning a firearm.

In every case it makes sense for the Chief of Police to conduct a criminal records check on the individual as well as a review of the Domestic Violence Registry, to determine whether grounds exist that would support denying return of the seized items. In terms of federal law, because the underlying abuse prevention order remains in effect, the Chief may return the individual's firearms permits, but should not return

guns in the absence of a court order, notwithstanding the validity of his Massachusetts permit, unless:

- a) The individual would not be subject to the preclusions under (g)(8) (e.g., is not an "intimate partner" as defined therein); or
- b) The individual is a law enforcement officer and the weapon will only be possessed on-duty; and
- c) The individual is not prohibited from handling or possessing firearms or ammunition under any other provision of law, such as (g)(9) or (g)(1).

Here again, keep in mind that in cases in which the defendant has a License to Carry, the Chief of Police who issued the License can still look at the underlying conduct to determine whether or not the defendant is a suitable person for a License to Carry. It is thus important to ensure that the appropriate licensing authority is notified.

This is a preliminary list of questions and answers. There have been proposals for amendment to the federal statute, and court challenges to the new law. More information will be forthcoming from the Office of the Attorney General, the Massachusetts Chiefs of Police Association, and others. If you have questions, please call Assistant Attorney General Carolyn Keshian at (617) 727-2200.

# Law Enforcement Newsletter

## Sex Offender Registration And Community Notification Update

Carolyn Keshian  
Assistant Attorney General  
Family and Community Crimes Bureau

### *Pending Legislation*

**G**.L. c. 6, § 178J (b)(ii) currently permits a person to inquire with the city or town police department whether "any sex offenders live or work within a one-mile radius of a specific address, including, but not limited to, a residential address, a business address, school, after-school program, day care center, playground, recreational area, or other identified address." Because police do not always possess the technical capability to determine the boundaries of a one-mile radius with specificity, legislation has been filed, with input from the Massachusetts Chiefs of Police Association, to replace this provision with language that would permit people to inquire whether any sex offenders live or work within the city or town.

### *Relevant Case Law*

Sex Offender Registry and Community Notification Act Upheld in Federal District Court: The Sex Offender Registration and Community Notification does not violate the *Ex Post Facto*, Bill of Attainder, Double Jeopardy, Equal Protection and Due Process Clauses, and does not impose Cruel and Unusual punishment. Doe v. Weld, No. 96-11968-PBS (D. Mass., December 18, 1996), United States District Court. The plaintiff, a juvenile, sought a preliminary injunction and declaration that the Act is unconstitutional. The federal district court denied the juvenile's motion finding it unlikely that the constitutional challenges would succeed on the merits.

The central challenge raised by the juvenile was that the Act imposes punishment as applied to juveniles because the Act retroactively strips them of the confidentiality traditionally supplied to juvenile offenders. The court, assuming the juvenile to be a level one offender, rejected the juvenile's contention that juveniles are "punished" by the public availability of their otherwise confidential information.

Procedures For Community Notification -- Dissemination Stayed Pending Judicial Review: A justice of the Superior Court ruled that the Sex Offender Registry Board ("Board"), which is responsible for classifying sex offenders based on their level of risk of reoffense, must notify offenders who are classified as level two or level three that no

dissemination of their classification will take place pending judicial review of the board's decision. Poe v. Attorney General, et al., No. 96-6237-B (Suffolk Superior Court, December 19, 1996).

The plaintiffs sought a preliminary injunction on the issue of whether they were entitled to an injunction prohibiting the Board from disseminating information while judicial review is pending. The Court granted the preliminary injunction and ordered the Board to adopt procedures to stay the release of sex offender information pending the outcome of judicial review in the Superior Court. Pursuant to the Act, level two and level three sex offenders are entitled to judicial review of their classification.

# Law Enforcement Newsletter

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## DOMESTIC VIOLENCE UPDATE

Joseph Whalen  
Assistant Attorney General  
Amy Seeherman, PhD.  
Research and Policy Analyst  
Family and Community Crimes Bureau

### *RECENT COURT DECISIONS*

#### *Service of Restraining Orders*

**T**he Supreme Judicial Court recently rendered its opinion on what constitutes compliance with the statutory provisions relating to service of restraining orders by police. In Zullo v. Goguen, 423 Mass. 679 (1996), the court addressed the requirement of G.L. c. 209A, §7, which provides that when vacate, refrain from abuse or no contact orders are issued and transmitted by the clerk to the appropriate law enforcement agency, such agency, "unless otherwise ordered by the court, shall serve one copy of each order upon the defendant..." The SJC concluded that in all instances, police should make a "conscientious and reasonable effort" to provide in-hand service on the defendant. Where such efforts fail, however, the police may notify the local court so that a judge, if satisfied that such an effort has been made, can authorize service by some other appropriate means.

In light of this decision, it is important to note that for purposes of charging and prosecuting a violation of a restraining order, a distinction can be drawn between **service** of the order and **notice** of the order's prohibitions. A conviction for violation of a restraining order requires proof that the defendant knew that the pertinent terms of the order were in effect, either by having received a copy of the order or by having learned of them in some other way. See Instruction 5.61, Model Jury Instructions for Use in the District Court. While recent trial court decisions have suggested that compliance with the statutory requirements for service are a necessary prerequisite for criminal prosecution, see Commonwealth v. Mojica, Middlesex Superior Court No. 96-0130 and Commonwealth v. McCarthy, Waltham District Court No. 9651CR2591 (reported in Mass. Lawyers Weekly, 12/16/96), a single justice of the Appeals Court has ruled that "nothing indicat[es] that in-hand service is required by statute or considerations of due process, when ... actual notice has been provided." Commonwealth v. Montalvo, Memorandum and Order pursuant to Rule 1:28, 5/13/96. Pending further clarification by the appellate courts, police officers must continue to

attempt to secure in-hand service of the order, but where that is not possible, police should also try to garner evidence that the defendant had actual notice of the restraining order's terms.

### *Arrests for Violations of Restraining Orders*

While proof that a defendant knew of the terms of a restraining order is necessary for conviction, it is not needed to establish probable cause to arrest for such a violation -- at least for purposes of civil liability. Such was the holding by the First Circuit Court of Appeals in a recent case involving a lawsuit brought against a Massachusetts police officer. In Logue v. Dore, 103 F.3d 1040 (1st Cir. 1997), a domestic abuse victim had obtained a temporary restraining order against her husband which prohibited him from entering the marital home. While the husband had obtained an amendment to that order which allowed him daytime access, the permanent order issued after a hearing contained no such amendment. Although the husband had attended the hearing, he left the courtroom prior to receiving the judge's ruling, and therefore did not know that the total prohibition had been reinstated. The husband was arrested the next day when he returned to the marital home.

Subsequent to the criminal charges against him being "dropped," the husband filed suit against the police officer for false arrest and false imprisonment under 42 U.S.C. §1983. The husband alleged that the officer lacked probable cause to arrest him because the officer had no reason to believe that the husband knew of the restraining order's terms. The First Circuit, however, affirmed the lower court's entry of judgment in favor of the police officer. The court reasoned that while proof of knowledge of the terms of the order is a necessary element for criminal conviction, it is not a necessary element to establish probable cause to arrest. At the time he made the arrest, the officer knew, having reviewed the order, that the husband's mere presence on the property constituted a violation of the order -- and this was sufficient to constitute probable cause. The court specifically rejected the contention that probable cause could only be established upon a reasonable belief that the offender knew the terms of the order, stating, "[w]hat the arrestee knows or does not know at the time of his apprehension is irrelevant to the question of whether the arresting officer has probable cause."

### *"Stay Away" Orders*

When a defendant is ordered to stay away from a victim's place of employment, how far away must he/she stay? This issue was decided recently by the Appeals Court in the case of Commonwealth v. O'Shea, 41 Mass. App. Ct. 115 (1996). Among other prohibitions, the restraining order required that the defendant stay at least 100 yards away from the victim, and that he also "stay away from [her] workplace [the town hall] ..." The defendant was arrested for being at a coffee shop located across a side street

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from the town hall where the victim worked, at a time when the victim was not at work. Rejecting the prosecution's contention that the order prohibited the defendant from being in the vicinity of the victim's workplace at all times, the court held that the stay away order created a "zone of privacy of 100 yards" around the victim "whenever she was present." The court ruled that since there was no evidence that the defendant came within 100 yards of the workplace while the victim was there, or entered on the property at any time, the defendant could not be found guilty of violating the order.

In another recent case decided by a probate court judge, a defendant's entry on the Registry of Civil Restraining Orders was ordered expunged, based upon its specific facts. Similar actions brought seeking expungement have been denied by Superior Court and Probate Court judges. The Supreme Judicial Court will address the issue of expungement in a case currently pending, which should give the courts guidance on handling these matters in the future. In the meantime, the Office of the Commissioner of Probation needs to receive notice of any defendant's effort to seek expungement. Should you become aware of the filing of any such motions, please contact Assistant Attorney General Joseph Whalen at (617) 727-2200.

## ***RECENT RESEARCH***

The remainder of this column is devoted to a summary of the following research article: "Tactics and Strategies of Men Who Batter: Testimony from Women Seeking Restraining Orders," by James Ptacek in Violence Between Intimate Partners: Patterns, Causes and Effects edited by Albert P. Cardarelli.

This study examined the motives underlying men's use of force and violence against their intimate partners. More specifically, the author focused on the types of violence men use against their wives or girlfriends and the objectives behind their abusive behavior. This information was based on testimony from women who had been the victims of violence at the hands of their male partners, contained in requests for restraining orders in two Massachusetts courts: the Dorchester and Quincy district courts.<sup>1</sup> Additional data were derived from the original complaint forms and the court orders issued by the judges. These data offer new insights about a subset of men who batter - - those against whom restraining orders have been issued - - and evidence about the types of violence that batterers inflict on their intimate partners. The data

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<sup>1</sup>It has been suggested by some professionals in the criminal justice system that there are victims of domestic violence who seek restraining orders frivolously in order to gain legal advantage in divorce cases or to take revenge against their intimate partners. "While this undoubtedly occurs in some cases, research shows that victims are much more likely to underreport violence than to fabricate or exaggerate it." (Adams, 1996).

also document the extraordinarily stressful lives of women who confront abusive situations daily and the strategies they must utilize to survive. This information may have important implications for those criminal justice professionals and treatment providers who work with victims or perpetrators of domestic violence.

### A Picture of Domestic Violence

A random sample of 100 domestic violence cases filed in 1992 was examined in this study: 50 cases drawn from the Dorchester District Court and 50 cases from the Quincy District Court. Through the personal accounts of battered women contained in court documents, the following picture of the victims of domestic violence emerges: battered women are subjected to physical violence, sexual assault, psychological abuse and economic abuse. Seventy percent of the women alleged acts that constitute assault and battery; nine percent of the women indicated that the alleged perpetrators had either threatened them with or had used knives or guns; 24 percent of the women in their affidavits described incidents of actual assault and battery with a dangerous weapon; and 18 percent sustained injuries "ranging from bruises and black eyes to broken bones, facial cuts and swelling, miscarriage, and damaged eardrums" (Ptacek, 1997:110). Six percent of the battered women indicated that their partners or ex-boyfriends had raped them or attempted to sexually assault them.

In addition to instances of actual physical and sexual violence, the women in this study reported being threatened with murder; more specifically, 24 percent of the women reported that their batterers had threatened to kill them. They were also threatened with destruction of property. Fourteen percent of the women indicated on the complaint forms that the property was destroyed, e.g., doors and windows were broken, tires were slashed, windshields were broken and telephones were ripped out of the wall. Additionally, 39 percent of the women reported verbal abuse in the form of partners or ex-partners yelling, screaming and shouting obscenities at them. Finally, almost the entire sample of women (92%) noted on their current complaint form past incidents which would be considered instances of assault and battery, malicious destruction of property, harassing telephone calls, breaking and entering, stalking, and violations of an existing restraining order. This last finding is consistent with other studies. Using the first six months of data entered into the Massachusetts restraining order database, Dr. Nancy Issac and her colleagues found in their study of male defendants in domestic violence cases that almost 75 percent (74.8%) of the men against whom restraining orders are issued have prior criminal records, and almost 50 percent (48.1%) have histories of violent crime (Isaac *et al.*, 1994).

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## The Strategies of Men Who Batter

In the 100 domestic violence cases examined in this study, one half of the women indicated the motivations underlying their partner's abuse and violence. These fell into four categories:

1. Violence aimed at preventing women from leaving abusive relationships. This type of abuse may take the form of forcing the woman to return to the violent situation or retaliating after she has left (Ptacek, 1997). In addition to the present study, other researchers have reported that this "separation violence" is the main reason behind a woman's decision to seek a restraining order (Mahoney, 1991:68).
2. Punishment and retaliation concerning the woman's actions regarding her children. Over 75 percent of the women in the present study were mothers, and they experienced violence and abuse as a result of their maternal status. For example, seven percent of the women reported being assaulted during pregnancy; 11 percent indicated that the perpetrator physically abused, sexually abused or made threats against the children; and five percent of the women were threatened with kidnapping of their children by the abuser. Finally, in 22 of the cases, violence and abuse erupted as a result of the woman questioning the man's authority over the children.
3. Retaliatory violence related to legal actions. Court documents also revealed that defendants in these domestic violence cases abused their partners when the women took legal action, such as calling the police, seeking a complaint for rape or taking out a restraining order. Twelve percent of the descriptions of motives for violence indicated that the perpetrators inflicted violence upon their intimate partners when the victims pursued legal action. Many women in this study experienced extreme emotional and physical distress and terror in their intimate relationships as a result of constant harassment, physical violence and threatening behavior. This finding helps explain why many victims of domestic violence refuse to testify at legal proceedings or drop the case entirely.
4. Retaliatory violence related to challenges to male authority. In 12 percent of the cases, women reported being subjected to violence after questioning their partner's abuse of alcohol or their partner's sexual relationships with other women or in response to their partner's extreme jealousy and possessiveness. Finally, six percent of the women in this sample recounted that their partners' violent behavior was an act of revenge, usually part of a pattern of threatening acts. The women did not explain the motives behind these acts of vengeance.

The findings of the present study underscore the continued need for the development of long-term resources that promote the independence of battered women

and children from their violent intimate partners, "expanded interventions for men who batter and strategies for early identification of abusive men in mental health and social service settings, and finally, preventive strategies for children and adolescents to offset the damage of witnessing violence and to avoid the intergenerational transmission of violence in adult relationships" (Browne, 1993). For more information on this article, please contact Amy Seeherman, Ph.D., at (617) 727-2200.

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## VICTIM COMPENSATION: A GUIDE FOR LAW ENFORCEMENT

Judith E. Beals  
Assistant Attorney General  
Chief, Victim Compensation and Assistance Division  
Family and Community Crimes Bureau

**V**iolent crime takes a devastating physical and emotional toll on victims and their families. As police officers, prosecutors and victim service providers, we are keenly aware of the injuries, pain and psychological trauma wrought by violent crime. Less well recognized, but no less severe, is its devastating financial impact -- mounting medical bills, funeral expenses and lost wages can quickly put a family in financial crisis, at a time when they may be least able to cope.

Fortunately, Massachusetts has a program to assist crime victims in paying for crime-related expenses. The program, which is administered by the Attorney General's Office through the Victim Compensation and Assistance Division, provides financial assistance, up to a maximum of \$25,000 per crime, to eligible victims and their families for medical, dental and mental health counseling expenses, funeral expenses and loss of wages or income. Police departments, prosecutors' offices and other law enforcement agencies play a vital role in informing victims about the availability of victim compensation, and in assisting the Division in making appropriate decisions on victims' claims. This article describes the program, focusing specifically on what law enforcement officials can do to make this assistance widely available to crime victims.

### ***WHAT IS VICTIM COMPENSATION?***

Massachusetts has long provided a means for crime victims to obtain limited financial assistance from the Commonwealth. Until 1994, however, the only way victims could get help was by filing a civil lawsuit against the Commonwealth in the district courts. Due to backlogs and overcrowded dockets, it often took up to three years for a victim to get any help. As structured, this system was unable to provide either prompt or compassionate assistance to victims struggling with their crime-related expenses.

After years of advocacy, in 1994, Attorney General Scott Harshbarger succeeded in securing passage of a victim compensation reform law. Under the new law, G. L. c. 258C, the compensation process was removed from the district courts and placed within the administrative responsibility of the Attorney General. Now, victims in

need of help submit a simple two-page application to the Attorney General's Victim Compensation and Assistance Division. The claims are verified and decisions are generally issued within three to six months of receipt.

Last year, the Division awarded \$4.26 million in compensation to crime victims. The average award was \$3,062. Compensation was awarded primarily to victims of assault (51% of all claims), followed by homicide survivors (26%), victims of child sexual assault (8%), domestic violence victims (6%), adult sexual assault victims (6%), DWI/DUI victims (2%) and others (1%).

### ***WHO IS ELIGIBLE FOR VICTIM COMPENSATION?***

Victim compensation is available to victims of violent crime and family members of homicide victims. A violent crime is defined as any crime occurring in Massachusetts that involves the application or threat of force, intimidation or violence. It specifically includes all crimes involving drunk driving and domestic abuse.

Victim compensation is generally not available to victims of property crimes. Recovery for property losses can only be obtained through an order of restitution at the time of sentencing.

### ***WHAT ARE THE BASIC ELIGIBILITY REQUIREMENTS?***

There are four basic requirements in qualifying for victim compensation:

First, the Division must determine that a violent crime occurred. Importantly, it is not necessary that the crime resulted in a conviction, prosecution, or even an arrest. Consequently, information about victim compensation should be made available to victims as soon as it is determined that the incident involves a violent crime, regardless of whether any prosecution is anticipated. Particularly in cases that are unlikely to go forward through the district attorney's office, police officers play a vital front-line role in informing victims about victim compensation.

Second, the Division must determine that the crime was reported to law enforcement officials within five days of its occurrence, unless there was good cause for delay. The Division must also determine that the victim has cooperated in the investigation and prosecution of the crime unless there is a reasonable excuse not to. In making these determinations, the Division is sensitive to unique experiences and needs of domestic violence and sexual assault victims. In cases of doubt, the Division consults with the investigating officer.

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Third, the Division must determine that the victim did not "provoke or contribute" to his or her injuries. This means, for example, that the Division will deny compensation to an individual who is injured in a bar room fight that he provoked or escalated, or to a drug dealer who is injured or killed during the course of an illegal drug transaction. The purpose of this requirement is to ensure that limited compensation dollars are targeted to innocent victims of crime. Whenever the Division is considering denying a claim on the basis of provocation or contribution, it seeks guidance from the investigators or prosecutors most familiar with the case.

Finally, the Division must determine that the claim has been filed within three years of the crime. Minor victims may file up until age 21. Other exceptions exist for crimes that were not discovered until more than three years after the crime.

## ***WHAT EXPENSES ARE COVERED?***

Once the Division determines eligibility, it proceeds to verify that victim's expenses. In so doing, it must determine that the expenses are not covered by insurance, public benefit programs or other funds. Essentially, victim compensation can only assist with expenses that would otherwise have to be paid from the victim's pocket.

Victim Compensation can assist with the following expenses:

1. Medical and dental expenses: This includes rehabilitation equipment and therapy, co-pays, prescription medicines and any other medical expenses not covered by insurance.
2. Mental health counseling: Counseling expenses are available to victims, to family members and dependents of homicide victims, and to children who witness violence against a family member.
3. Loss of income: Victims who are physically or psychologically disabled as a result of injuries from the crime are eligible for loss of earnings if they were employed at the time of the crime. Dependents of homicide victims may be compensated for the loss of the victim's financial support.
4. Funeral/burial expenses: These expenses may be reimbursed up to a maximum of \$4,000.

The maximum award is \$25,000 per crime. The program does not cover property losses, compensation for pain and suffering, or other losses. The Division does, however, provide information and referrals to victims seeking recovery for these

types of losses, as well as information about victim rights and referrals to other victim service agencies.

### ***WHAT IS THE ROLE OF POLICE DEPARTMENTS AND OTHER LAW ENFORCEMENT AGENCIES?***

Police departments, prosecutors' offices and other law enforcement agencies play a critical role in making the compensation program work. Particularly now, as the Division seeks to expand its outreach efforts, this front-line role is even more important. Law enforcement officials and agencies can help by:

1. Becoming knowledgeable about Victim Compensation. Brochures and applications are available to any law enforcement agency on request from the Division. In addition, the Division staff is available to provide in-house training. The Division will also make available to any agency a public affairs program on victim compensation produced by Continental Cablevision and the Attorney General's Office entitled "Issues and Answers with Scott Harshbarger". This program, 30 minutes in length, is an excellent training tool and includes interviews with victims who have received assistance through this program.

2. Make referrals to Victim Compensation. Law enforcement personnel at every level are encouraged to refer all potentially eligible crime victims to Victim Compensation. This information can make a real difference in a victim's recovery, and in whether the victim even seeks the medical and mental health services she or he needs. In addition to making brochures and applications available in reception areas, police officers are encouraged to keep copies on hand in their cruisers.

3. Respond to requests for information from the Division. The first step in the compensation process involves obtaining a copy of the police report. By responding promptly to these requests, the Division is able to make speedy determinations on victims' claims. If, due to the ongoing nature of the investigation, a department has concerns about releasing investigative reports, the Division can work with the department to address these concerns without delaying the provision of services to the victim.

In certain cases, the Division also looks to investigating and prosecuting officers for further information related to the victim's cooperation or possible contributory conduct. Prompt responses to these requests ensure that compensation is awarded only in appropriate cases, and only after direct input from those with the most information about the case.

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We know from experience that Victim Compensation makes a real difference in the lives of crime victims. The time is right to ensure that information about this program is made widely available throughout all levels of the criminal justice system. If you would like brochures or applications, training or other information, please contact Judith E. Beals, Chief of the Victim Compensation and Assistance Division, or David B. Andrews, Deputy Program Director of the Division, at (617) 727-2200.

# **FIRE SCENE SEARCHES - QUESTIONS & ANSWERS ON ADMINISTRATIVE WARRANTS**

**Brett Vottero  
Assistant Attorney General  
Narcotics & Special Investigations Division**

**W**hen does a fire investigator need a warrant to enter a fire damaged building in order to determine the cause of a fire? Chapter 148, § 2, of the Massachusetts General Laws requires that every fire that causes damage to property be investigated. It also commands the local department to "begin such investigation forthwith after such fire." Despite this statutory duty to investigate, any entry by governmental officials onto private property must comply with applicable state and federal constitutional provisions which prohibit unreasonable searches and seizures. For this reason, fire investigators must, in certain circumstances, obtain a warrant in order to enter private property to determine the cause of a fire. Since both state and federal courts will not permit the introduction of evidence that has been seized in violation of a constitutional right, failure to conduct a proper fire scene search can result in irreparable harm to an arson prosecution. Because proof of a deliberately set fire is an essential element of an arson prosecutor's case, the loss of the evidence observed or seized during a cause and origin examination will usually result in a dismissal of all criminal charges. This article reviews the law of fire scene searches under both federal and Massachusetts law and attempts to answer the most common questions. In addition, the article offers practical suggestions for fire investigators and arson prosecutors to assist them in conducting and justifying fire scene searches.

In Massachusetts, the case of Commonwealth v. Jung, 420 Mass. 675 (1995), gave the Supreme Judicial Court its first opportunity to consider the law of fire scene searches since the landmark United States Supreme Court decisions of Michigan v. Tyler, 436 U.S. 499 (1977) and Michigan v. Clifford, 464 U.S. 287 (1983). While the facts of these cases will be familiar to most fire investigators, it would be a mistake for investigators and lawyers to place undue emphasis upon the holdings. Factual distinctions between the cases preclude them from being implemented as concrete guidelines. Indeed, in declining to create more definite rules, the Supreme Court noted that the circumstances of every fire and the subsequent investigations would "vary widely." Tyler, 436 U.S. at 510 n. 6. The Clifford and Tyler decisions sharply divided the Supreme Court, and it is worth noting that six of the current nine Supreme Court Justices were not on the Court when either case was decided. Despite the questionable viability of the holdings of Clifford and Tyler, there are three general principles stated in those cases that are beyond serious dispute.

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**First**, firefighters have the right to "make a forceful, unannounced, nonconsensual, warrantless entry into a burning building." Clifford, 464 U.S. at 299. As stated by Justice White, "The firetruck need not stop at the courthouse in rushing to the flames." Tyler, 436 U.S. at 516. **Second**, firefighters have the "right to remain on the premises, not only until the fire has been extinguished and they are satisfied there is no danger of rekindling, but also while they continue to investigate the cause of the fire." Clifford, 464 U.S. at 299-300. **Third**, once investigators "have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be conducted only pursuant to a warrant, issued upon probable cause that a crime has been committed, and specifically describing the places to be searched and the items to be seized." Id. at 300.

A fourth principle, upon which there is a strong division within the Supreme Court, was also established in these cases. This rule may be stated as follows. Investigators must obtain an administrative warrant if they wish to conduct a search to determine the cause and origin of a fire on private property if they have not commenced their search before officials depart the scene or have not completed their search within a reasonable period of time following the fire. Such a warrant must meet all the usual requirements for a criminal search warrant, except that an administrative warrant may issue upon a showing that a fire of unknown origin has occurred. (Unlike a criminal warrant, the administrative fire scene warrant does not have to establish probable cause to believe that a crime has been committed and that relevant evidence will be found in the place to be searched.)

The application of these principles to individual fire scenes has proved difficult for several reasons. First, subtle differences in language among majority, concurring, and dissenting opinions make reasonable predictions about future rulings tenuous, at best. Second, some factual assumptions about fire service operations are not accurate. This leads to difficulty relating the rulings to everyday practice in most fire departments. Finally, the uniqueness of each fire scene makes factual comparisons especially difficult. In short, this trio of cases raises many additional questions for fire investigators in Massachusetts who are earnestly seeking to conduct lawful scene examinations that will withstand challenges by defense lawyers.

## ***I. WHEN DO I NEED AN ADMINISTRATIVE WARRANT?***

While it is this very question which has caused such great division in the United States Supreme Court, current case law requires an administrative warrant in two situations. First, where the fire has been extinguished and police and fire officials have left the scene, an administrative warrant is required to re-enter the property to begin a cause and origin investigation. Second, even if the cause and origin examination was

begun immediately after the fire was extinguished and before officials have left the scene, a warrant is required if the investigation is not completed within a reasonable period of time. Michigan v. Clifford, 464 U.S. 287, 293 (1983).

## **II. WHAT CONSTITUTES A REASONABLE PERIOD OF TIME?**

Unfortunately for fire investigators, there is no simple answer to this question. Though a court might rule that warrantless post-fire searches must be conducted or completed within, for example, 24 hours, such a "bright-line" rule has neither been proposed nor adopted. Nor can investigators determine a specific amount of time by reference to prior cases. One collection of cases notes that a lapse of 11 hours was permissible, while other cases have found that a delay of three to four hours was unreasonable. See 31 A.L.R. 4th 194. Investigators should instead consider the following factors which have been identified by courts as significant in determining what is a reasonable period of time:

### **A. Continuity**

The continuous presence of fire officials from the time of extinguishment until the commencement and completion of the cause and origin investigation may be the most significant factor in a court's ruling. Maintaining the security of the premises by a continuous presence of fire officials is the best practice. If this is not possible, the delay between departure of all personnel and the re-entry to conduct the scene examination should be as brief as possible and investigators should be prepared to explain why the delay was necessary. Where a preliminary scene examination has taken place before fire personnel have departed, greater delays in completing the full scene examination have been found reasonable. Where all personnel have left the property before any investigation as to the cause of the fire, a later re-entry should be done with consent or an administrative warrant.

### **B. Building Conditions**

Where an immediate scene examination is not practicable or safe due to structural damage, weather, or hazardous debris, a longer delay can be considered reasonable. Investigators should note, in writing, the specific reasons why any delay was necessary.

### **C. Extent of Damage**

In small fires, where the premises remain habitable, even a short delay may be found to be unreasonable. Conversely, a total destruction of a building will permit (and probably require) a longer cause and origin examination and a greater delay will be found reasonable. Since the constitutional protections against unreasonable searches

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and seizures only apply when there is a reasonable expectation of privacy, it may be that a fire extinguishes any privacy interest. "Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner's efforts to secure it against intruders. Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, . . ." Michigan v. Clifford, 464 U.S. at 292. Investigators should not rely on this possibility to avoid obtaining an administrative warrant to continue their investigation. Prosecutors should, however, consider making this argument to the trial court in order to preserve the issue for appellate review or to justify an otherwise objectionable search.

## ***D. Owner or Occupant's Actions***

Where the owner or occupant has made an effort to secure the fire-damaged property against intruders, this demonstration of privacy interest will generally reduce the length of time that is considered reasonable and investigators should seriously consider obtaining an administrative warrant in these circumstances, even if other factors suggest that the "reasonable period" has not expired.

## ***E. Type of Property***

The cases specifically note that the type of property will affect how much time is reasonable. Single family homes, businesses, and large apartment units are likely to be viewed differently. Historically, dwellings have been accorded the greatest protections because they are viewed as being cloaked with the strongest privacy interest.

## ***F. Length of Scene Examination***

Where the fire has caused extensive damage, or where the fire involves a large commercial building, a complete cause and origin determination may require entry and re-entry over several days or longer. While courts may find a longer examination reasonable in such cases, investigators should proceed with caution and a consent to search or an administrative warrant should be obtained. This is true even if the cause and origin examination begins while fire suppression personnel are still at the scene.

Thus, while no set amount of time can be considered reasonable or unreasonable, fire investigators who wish to conduct a non-consensual fire scene examination should consider obtaining an administrative warrant whenever there is any question whether a particular search would be considered reasonable. Administrative warrants will be considered a minor burden to be placed upon investigators and Massachusetts courts are likely to encourage investigators to obtain such a warrant in

close cases. In fire scene searches, it is best to err on the side of obtaining an administrative warrant. To do otherwise places the entire criminal case at risk of dismissal due to the suppression of the cause and origin examination.

### ***III. WHAT DOES AN ADMINISTRATIVE WARRANT ALLOW ME TO DO?***

All searches must be confined to the legal object of the search. An administrative warrant is granted only for the purposes of determining the cause and origin of a fire. The warrant itself, and any search conducted with the warrant, must be limited to areas that are relevant to determining the cause of the fire. In Commonwealth v. Jung, 420 Mass. 675 (1995), evidence was suppressed because the administrative warrant authorized a search of the entire building even though investigators had already determined that the fire had begun in the basement. For this reason, the warrant and the search pursuant to it should have been limited to the basement. Careful drafting of the warrant application and adherence to generally accepted fire investigative procedures should result in the issuance of very broad warrants, despite the holding in Jung. It is important for the warrant application to describe how the cause and origin determination will be made in order to explain why examination of apparently undamaged areas is necessary to arrive at an accurate conclusion as to the fire's cause. For example, a fire which appears to have an accidental cause may ultimately be found to be incendiary if uncommunicated burnt areas or intact ignition devices are located elsewhere on the property. (Properly drafted and explained, this should demonstrate why opening all closets and cupboards is a reasonable part of every cause and origin examination.) Any suggestion that such a search is really a search for criminal evidence should be countered by the obvious fact that an erroneous finding of accidental ignition is inconsistent with public safety and the permissible scope of the search. Conversely, two separate areas of origin which are suggestive of arson may be determined to be the result of convection or systematic accidental faults which can only be accurately determined by a full structure search.

### ***IV. DO I HAVE TO STOP MY SEARCH IF I FIND EVIDENCE OF ARSON?***

No. Even when facts are known which suggest arson, a continued examination is permitted as long as the examination remains aimed at establishing the cause of the fire and does not become a general search for evidence of a crime. For example, investigators would never be permitted to examine papers, financial records, or correspondence to determine or establish a motive for an arson without a criminal search warrant or consent. Investigators and prosecutors should keep in mind that the cause and origin investigation should not stop simply because strong evidence of arson is found. Investigators must complete every scene examination in order to ensure that there was no accidental ignition. Even the presence of an accelerant and a timing device will not warrant a conviction for arson, regardless of the defendant's intentions, if there is a reasonable doubt that an accidental ignition took place.

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## **V. *WHEN IS AN ADMINISTRATIVE WARRANT NOT NECESSARY?***

As a practical matter, considering the number of fire scene searches, there should be very few cases where administrative warrants are necessary. Justice Stevens of the United States Supreme Court has stated the obvious: "Presumably, most postfire searches are made with the consent of the property owner. Once consent is established, such searches, of course, raise no Fourth Amendment issues." Clifford, 464 U.S. at 301. If at all possible, investigators should obtain a valid written consent to search by the property owner and/or occupant before conducting a full scene examination. A refusal to give consent is rare. Administrative warrant cases usually arise where the owner or occupant is not known or cannot be located.

## **VI. *WHEN SHOULD I TELL THE OWNER OR OCCUPANT I AM GOING TO CONDUCT A CAUSE AND ORIGIN SEARCH?***

Investigators should make every effort to notify the owner or occupant that a search to determine the cause and origin will be conducted. This should be done as early as possible and before entry is made. Whether the search is being conducted as overhaul continues or days later with an administrative warrant, notifying the owner may make the search easier to justify in court. In Clifford, a majority of the United States Supreme Court justices ruled that no warrant of any type was necessary to conduct a cause and origin examination where the search was done with notice to the owner or occupant. This argument has not yet been made to the Massachusetts Supreme Judicial Court, however, and investigators should not rely on the Clifford ruling to avoid obtaining an administrative warrant. See Jung, 420 Mass. at 684 n. 8.

## **VII. *HOW DO I GET AN ADMINISTRATIVE WARRANT?***

Warrants to conduct a non-consensual post-fire search of private property are authorized pursuant to G. L. c. 148, § 2, which requires local fire officials and/or the State Fire Marshal to investigate the cause and circumstances of fires. Investigators must prepare an affidavit and warrant and present them to a Judge or Clerk-Magistrate for review. While the affidavit that must be prepared needs only demonstrate that "a fire of undetermined origin has occurred on the premises," investigators must ensure that the warrant itself is properly drafted to limit its scope. Sample affidavits and warrants are available from the Office of the Attorney General.

### ***VIII. WHAT IF I HAVE MORE QUESTIONS? WHO CAN I ASK?***

Call the arson prosecutor in your local District Attorney's Office. Or, call Assistant Attorney General Brett Vottero at (617) 727-2200 during office hours, or after hours by paging (617) 945-4476. In addition, the Office of the Attorney General and the Department of Fire Services of the Massachusetts Fire Academy regularly sponsor legal training for fire investigators. A two-day seminar entitled **Arson Investigation and Prosecution** will be held on April 23-24, 1997. For more information, please call the Department of Fire Services, Massachusetts Fire Academy at (508) 567-3100.

## I.N.S. DEPORTATION PROCEDURES UPON CRIMINAL CONVICTIONS

John Grossman  
Assistant Attorney General  
Public Integrity Division

**T**he Immigration Naturalization Service (I.N.S.) seeks deportation of an alien defendant following a criminal conviction. This article outlines the steps that must be taken in state court in order for deportation to occur.

### *I. WHEN WILL A DEFENDANT BE DEPORTED?*

#### *A. Conviction of a Listed Crime*

There are five categories of state criminal convictions that will lead to deportation:

1. a crime involving "moral turpitude" that is:
  - a. committed within five years of entry into the United States and
  - b. punishable by a sentence of one year or longer;<sup>1</sup>
2. two or more crimes involving moral turpitude not arising out of a single scheme -- regardless of when the alien entered the country and the potential sentence;
3. any "aggravated felony";
4. any violation of the controlled substance act (G.L. c. 94C), including conspiracy, unless the violation involves possession for personal use of 30 grams of marijuana or less (certain violations of G.L. c. 94C, § 34); and
5. firearms offenses (e.g. G.L. c. 269, §§ 10, 10E).

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<sup>1</sup> Until this year, a court had to actually impose a sentence of a year or more to trigger deportation. Under current law, it is much more difficult for a judge to craft a sentence that will avoid deportation.

See 8 U.S.C. § 1251. These five categories often overlap. Perhaps the most inclusive of the listed categories is that which targets “crimes involving moral turpitude.” Although there is no statutory definition of “moral turpitude”, most of these types of crimes have been classified, and one author has offered five broad categories into which such crimes fit:

1. crimes against the person, including murder (G.L. c. 265, § 1), manslaughter (G.L. c. 265, § 13), kidnapping (G.L. c. 265, § 26), mayhem (G.L. c. 265, § 14), rape (G.L. c. 265, § 22) and assault with a dangerous weapon (G.L. c. 265, § 15A), but not simple assault (G.L. c. 265, § 13A);
2. sexual crimes, including prostitution (G.L. c. 272, § 53A);
3. crimes against the family relationship, including polygamy (G.L. c. 272, § 15);
4. crimes against property, including arson (G.L. c. 266, § 1), embezzlement and larceny (G.L. c. 266, § 30), forgery (G.L. c. 267, § 1) and burglary (G.L. c. 267, § 15); and
5. crimes against the government, including perjury (G.L. c. 268, § 1), bribery (G.L. c. 268A, § 2) and willful tax evasion (G.L. c. 62C, 73(a)).

See Robert Frank, *Criminal Defense of Foreign Nationals*, New Jersey Lawyer 36 (February/March 1995), quoting Gordon & Mailman, *Immigration Law and Procedure*, §§ 71.07, 61.03.

The category of “aggravated felonies” is also very inclusive. Examples of aggravated felonies are murder, trafficking in a controlled substance, failure to appear (G.L. c. 276, § 82A) to answer to a felony for which a sentence of two years or more may be imposed, crimes involving violence, theft or burglary offenses for which the court imposes a sentence of five years or more, and offenses involving fraud or deceit in which loss to the victim exceeds \$10,000. See 8 U.S.C. § 1101(a)(43).

Crimes of domestic violence, stalking (G.L. c. 265, § 43), child abuse (e.g., G.L. c. 265, § 13J), and violations of protective orders (G.L. c. 209A, § 7) have recently been given special attention by Congress and now constitute separate grounds for deportation. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996).

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## *B. There must be a final guilty finding*

Whatever the crime, it is important to understand that the I.N.S. can only deport if a defendant is finally convicted; thus, there must be a finding of guilt by a judge or a jury after trial or a guilty plea. A "guilty, filed" is not sufficient. White v. I.R.S., 17 F.3d 475, 479 (1st Cir. 1994).

In order for a conviction to be "final", the defendant must have pursued or waived all avenues of direct appeal of the court's finding of guilt. In the past, it was the position of the I.N.S. that a continuance without a finding ("CWO") could not support deportation, because in most instances there is not sufficient finality to the punishment the sentencing court imposes. The agency is currently reviewing the issue in light of changes to the definition of "final conviction" contained in IIRIRA.

It is important to note that even when a conviction is not final, the I.N.S. may still bring deportation charges against aliens who have entered the country illegally or who have remained without permission after the expiration of a temporary visa.

## **II. STEPS TO FACILITATE DEPORTATION**

### **A. *The Court Must Warn the Defendant that He Could Be Deported Before Accepting a Guilty Plea.***

If a defendant pleads guilty or nolo contendere and deportation is a possibility, the court must advise the defendant that the conviction could "have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization . . . . "If the court does not issue this warning, the conviction can be vacated at any time. Moreover, if there is no record of the warning having been given (if, for instance, the tape from a district court proceeding has been destroyed), the presumption is that the judge never gave the warning. G.L. c. 278 § 29D. Although in the past, dangerous criminals have pled guilty, served their time, and then had their convictions vacated because the Commonwealth could not prove that the sentencing court had given the required warnings, this should no longer be a problem. Records of Superior Court hearings are not destroyed. Moreover, through a joint effort of the Law Enforcement Coordination Committee (LECC), comprised of federal and state law enforcement agencies, and the Chief Justice for the District Court Department, a new, mandatory plea form has been implemented in district courts

which requires defendants to acknowledge that they understand that if they are not citizens, the conviction may lead to deportation or prevent naturalization. (A copy of the form follows this article.)

### ***B. The I.N.S. Initiates Deportation Proceedings***

The I.N.S. periodically visits state prisons and Houses of Correction to review prisoners' files and identify which prisoners are eligible for deportation. The agency then initiates deportation proceedings on site through their "Institutional Hearings Program". Under this program, an Immigration Judge hears the I.N.S.'s case for deportation prior to the completion of an alien's sentence. The I.N.S. does not deport all aliens convicted of deportable crimes. Some are eligible for waivers of deportation or for political asylum. If you do not want to rely on the Institutional Hearings Program to deport a specific alien defendant, you can alert the I.N.S. of an alien's conviction by contacting the duty officer of the I.N.S. Investigations Section at (617) 565-3100.

In most cases, actual deportation will only take place after the defendant serves whatever jail or prison time to which he is sentenced, 8 U.S.C. § 1252(h)(1), but once the I.N.S. knows about a conviction, it will lodge a detainer against the alien, assuring that he or she will go straight from the state facility into federal custody. If, however, an alien is convicted of a non-violent deportable offense, the Governor can request that the I.N.S. deport the alien before he completes his sentence. 8 U.S.C. § 1252 (h)(1).

### ***III. I.N.S. CONTACTS***

If you want to alert the I.N.S. to a conviction of someone you believe to be an alien or have enforcement-related questions, you should call the duty officer at the I.N.S. Investigations Section at (617) 565-3100. If you have legal questions, contact Assistant District Counsel Richard Neville at (617) 565-1040.

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS	DOCKET NO.	NO OF COUNTS	Trial Court of Massachusetts District Court Department
	NAME OF DEFENDANT		
INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.			

SECTION I TENDER OF PLEA

Defendant in this case hereby tenders the following: ☐ PLEA OF GUILTY ☐ ADMISSION TO FACTS SUFFICIENT FOR A FINDING OF GUILTY conditioned on the dispositional terms indicated below. Include all proposed terms (guilty finding, finding of sufficient facts, continued without finding, dismissal, fine, costs, probation period and supervision terms, restitution amount including the identification of the recipient of restitution, and an sentence of incarceration, split sentence or suspended sentence, etc.). Number each count and specify terms for each count separately.

COUNT	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees - Check "No" if Prosecution disagrees)	PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
	YES NO	
	YES NO	
	YES NO	
	YES NO	
	YES NO	

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
		X	

SECTION II PLEA OR ADMISSION ACCEPTED BY THE COURT

Court ☐ ACCEPTS the tendered Plea or Admission on defendant's terms set forth in Section I, and will impose sentence in accordance with said terms, subject to submission of defendant's written WAIVER (see Section IV on reverse of this form), completion of the required oral COLLOQUY, a determination that there is a FACTUAL BASIS for the Plea or Admission, and notice of ALIEN RIGHTS.

SECTION III PLEA OR ADMISSION REJECTED BY THE COURT

Court <input type="checkbox"/> REJECTS the defendant's dispositional terms set forth above and, in accordance with Mass. R. Crim. P. 12(c)(6), has set forth the dispositional terms it would find acceptable, to wit:	DEFENDANT'S DECISION IF COURT REJECTS TENDERED PLEA OR ADMISSION:
	<input type="checkbox"/> Defendant WITHDRAWS the tendered Plea or Admission; the parties must complete and file a Pretrial Conference Report, a Pretrial Hearing must be conducted and a trial date scheduled, if necessary.  <input type="checkbox"/> Defendant ACCEPTS terms set forth by the Court, a Plea or Admission will be accepted by the court and said dispositional terms imposed, subject to submission of defendant's written WAIVER (see Section IV on reverse of this form), completion of the required oral COLLOQUY, a determination that there is a FACTUAL BASIS for the Plea or Admission, and notice of ALIEN RIGHTS.

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (if rejection decision made)	DATE
		X	

**SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)**

I, the undersigned defendant, understand and acknowledge that I am voluntarily giving up the right to be tried by a jury or a judge without a jury on these charges.

I have discussed my constitutional and other rights with my attorney. I understand that the jury would consist of six jurors chosen at random from the community, and that I could participate in selecting those jurors, who would determine unanimously whether I was guilty or not guilty. I understand that by entering my plea of guilty or admission, I will also be giving up my right to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to testify or provide evidence against myself by asserting my privilege against self-incrimination, all with the assistance of my defense attorney; and to be presumed innocent until proven guilty by the prosecution beyond a reasonable doubt.

I am aware of the nature and elements of the charge or charges to which I am entering my guilty plea or admission. I am also aware of the nature and range of the possible sentence or sentences.

My guilty plea or admission is not the result of force or threats. It is not the result of assurances or promises, other than any agreed-upon recommendation by the prosecution, as set forth in Section I of this form. I have decided to plead guilty, or admit to sufficient facts, voluntarily and freely.

I am not now under the influence of any drug, medication, liquor or other substance that would impair my ability to fully understand the constitutional and statutory rights that I am waiving when I plead guilty, or admit to sufficient facts to support a finding of guilty.

I understand that if I am not a citizen of the United States, conviction of this offense may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF DEFENDANT

DATE

X

**SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L.c. 218, § 26A)**

As required by G.L.c. 218, § 26A, I certify that as legal counsel to the defendant in this case, I have explained to the defendant the above-stated provisions of law regarding the defendant's waiver of jury trial and other rights so as to enable the defendant to tender his or her plea of guilty or admission knowingly, intelligently and voluntarily.

SIGNATURE OF DEFENSE COUNSEL

B.B.Q. NO.

DATE

X

**SECTION VI JUDGE'S CERTIFICATION**

I, the undersigned Justice of the District Court, addressed the defendant directly in open court. I made appropriate inquiry into the education and background of the defendant and am satisfied that he or she fully understands all of his or her rights as set forth in Section IV of this form, and that he or she is not under the influence of any drug, medication, liquor or other substance that would impair his or her ability to fully understand those rights. I find, after an oral colloquy with the defendant, that the defendant has knowingly, intelligently and voluntarily waived all of his or her rights as explained during these proceedings and as set forth in this form.

After a hearing, I have found a factual basis for the charge(s) to which the defendant is pleading guilty or admitting and I have found that the facts as related by the prosecution and admitted by the defendant would support a conviction on the charges to which the plea or admission is made.

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE

DATE

X

## THE ALCOHOLIC BEVERAGES CONTROL COMMISSION

**William A. Kelley, Jr., Legal Counsel  
Alcoholic Beverages Control Commission  
&**

**Maurice DeVendo, Chief Investigator  
Alcoholic Beverages Control Commission**

**W**ith the recent passage of the holiday season, alcoholic beverages were in the forefront of every person's mind. What every person may not have realized is that there exists one agency with statewide jurisdiction and primary authority to regulate and control the alcoholic beverages industry in Massachusetts: The Alcoholic Beverages Control Commission (ABCC). The ABCC holds plenary authority to regulate any business involving alcoholic beverages and has within it an investigative division whose members hold the statutory authority to investigate any violations of the Massachusetts liquor laws and to make arrests and seizures without a warrant for such violations.

The legislature created the ABCC in response to the repeal of Prohibition, recognizing that a regulatory scheme should be supervised by a single agency with statewide jurisdiction in order to establish and maintain uniformity in the control over alcoholic beverages in Massachusetts. The ABCC is charged with the responsibility for the "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages as defined in section one of chapter one hundred and thirty-eight and also of the quality, purity and alcoholic contents thereof."

The ABCC has three members, one chairman and two associate commissioners. Currently, Walter Sullivan serves as Chairman of the ABCC, and Frederick W. Riley, Esq. and Suzanne Iannella are the two Associate Commissioners. These members are appointed by the Governor. The chairman's term and one associate commissioner's term are co-terminous with the Governor's. The third member's term is for four years. In addition to these members, the ABCC employs an Executive Secretary and various other assistants, including the members of the Investigative Division. The ABCC conducts three functions to fulfill its statutory responsibility: 1) licensing; 2) adjudication; and 3) regulation.

## ***I. LICENSING***

The ABCC is the sole agency in Massachusetts responsible for directly licensing or permitting specific participants in the alcoholic beverages industry in Massachusetts. All manufacturers of alcoholic beverages, all wholesalers and importers, all out-of-state suppliers of alcoholic beverages, all brokers, all salespeople, all warehouses, all planes, trains, ships, ship chandlers, and most motor vehicles transporting alcoholic beverages in Massachusetts require direct licensing from the ABCC. Approximately 10,000 such licenses and permits are issued by the ABCC each year.

In addition, the ABCC must also approve the granting of every retail pouring or package store license application allowed by a city or town. There are approximately 10,000 retail pouring or package store licenses in Massachusetts. The ABCC establishes and maintains files and records for each licensee or permittee with which it is involved. Most, if not all, of these files and records are public records available for examination and copying at the ABCC offices on any Monday, Wednesday or Friday from 9:30 a.m. to 4:00 p.m.

## ***II. ADJUDICATION***

The ABCC is statutorily empowered to hear cases brought before it. The three commissioners sit as administrative law judges deciding the cases that are brought before them. Cases come before the ABCC mainly in two ways: 1) an appeal from an action against a licensee\applicant taken by a local licensing authority in a city or town (whether it is a denial of an application for a license or the appeal of a suspension\revocation imposed against the license for violating the law), and 2) action is taken against a licensee\applicant by the ABCC's investigative division or other staff. In hearing these cases, the ABCC has the authority to administer oaths and to subpoena witnesses and records. These hearings are open to the public. The ABCC establishes and maintains files and records for each case that it hears. All these files and records are also public records available for examination and copying at the ABCC offices on any Monday, Wednesday or Friday from 9:30 a.m. to 4:00 p.m.

## ***III. REGULATION***

The ABCC has the broad-based authority to promulgate regulations "clarifying, carrying out, enforcing and preventing violation of, all and any of its provisions for inspection of the premises and method of carrying on the business of any licensee, for insuring the purity, and penalizing the adulteration, or in any way changing the quality or content, of any alcoholic beverage, for the proper and orderly conduct of the licensed business...". The ABCC has promulgated a

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body of regulations (found at Chapter 204 of the Code of Massachusetts Regulations) that control the method by which a business with an alcoholic beverages license is conducted. Some of these regulations are well-known by their common name, e.g., the "Happy Hour Regulation" (204 C.M.R. 4.00, et seq.) and the "Tag-A-Keg Regulation" (204 C.M.R. 9.00, et seq.). Violation of any regulation of the ABCC may be prosecuted against a licensee either criminally, or administratively (to impose a suspension, revocation, cancellation or modification on the alcoholic beverages license).

The Investigative Division of the ABCC has, since 1994, conducted so-called "stings" against retail licensees (both pouring licenses and package stores) to address the problem of sales to persons under the legal age of 21 years old. The Investigative Division has executed these "sting" operations in cooperation and coordination with police departments throughout Massachusetts. Although facing persistent legal challenge from licensees, these "sting" operations as conducted by the ABCC investigators have, thus far, survived opposition. In fact, most recently, in rejecting a challenge to the legality of these "sting" operations as being in violation of the Fourth Amendment, a Superior Court justice noted that "the development of thorough and detailed guidelines, such as those used by the ABCC, is the preferred practice for implementing sting operations involving minors."

The "stings" conducted by the Investigative Division have provided the following statistics. In 1994, 344 licensees were investigated in 11 communities that resulted in 92 alleged illegal sales to a person under the age of 21 years old. This operation showed that 27% of licensees investigated made an allegedly illegal sale. In 1995, 1393 licensees were investigated in 24 communities that resulted in 348 alleged illegal sales to a person under the age of 21 years old. This operation showed that 25% of licensees investigated made an allegedly illegal sale. In 1996, 1,679 licensees were investigated in 47 communities that resulted in 381 alleged illegal sales to a person under the age of 21 years old. This operation showed that 22.69% of licensees investigated made an allegedly illegal sale.

One of the agency goals for 1997 is the continuation and expansion of existing partnerships and cooperation with law enforcement agencies in Massachusetts along with the formation of new partnerships. With these partnerships, the ABCC can widely share both its expertise and the information that has been developed through the years to advance the benefits that come from community policing. The ABCC is interested in providing mutual support to ensure that licenses are exercised legally and in a manner which will protect the common good.

Further information can be obtained from Maurice DeVendo, Chief Investigator at 617-727-3040, ext. 316 and from William A. Kelley, Jr., Esq. at 617-727-3040, ext. 317.

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## I. SEARCH AND SEIZURE

### A. Warrantless searches

SJC adopts United States Supreme Court decision that exigency is no longer required to justify a warrantless search with probable cause where a car is stopped in transit, or searched and seized in a public place. Commonwealth v. Motta, 424 Mass. 117 (1997).

The defendant had bought heroin from an undercover police officer seven times, and was en route to completing another heroin deal with a DEA agent when the car he was driving was stopped, and he and his co-defendant, the passenger, were arrested. Their motion to suppress based on the warrantless search of the car was granted on the ground that although police had probable cause to believe contraband was in the car, no exigent circumstances existed to permit the warrantless search. The Commonwealth appealed, and the Supreme Judicial Court vacated the suppression order.

The Supreme Judicial Court first concluded that the motion judge properly determined that probable cause existed to search the car based on the seven prior heroin purchases as well as the forthcoming heroin deal with a DEA agent. Importantly, for the first time, the SJC explicitly rejected the

argument that article 14 of the state constitution provides more protection than the Fourth Amendment to the United States Constitution in the area of automobile searches. The SJC adopted, under state constitutional principles, the recent United States Supreme Court decision that where probable cause exists, exigency is no longer required to justify a warrantless search of a motor vehicle stopped in transit, or searched or seized in a public place. "We therefore conclude that, when an automobile is stopped in a public place with probable cause, no more exigent circumstances are required by art. 14 beyond the inherent mobility of an automobile itself to justify a warrantless search of the vehicle."

Warrantless search and seizure upheld where defendant's father voluntarily consented to police entry into home. Commonwealth v. Sanna, 424 Mass. 92 (1997).

During a homicide investigation where the victim was stabbed numerous times, police found fingerprints matching a fingerprint on file. The police chief and a sergeant went to the defendant's home without a warrant, and were let into the house by the defendant's father who knew the police chief. The defendant was lying on a couch covered with a blanket. He had visible cuts on his face and hands, and when the sergeant removed the blanket,

numerous other cuts were evident. The defendant was read his Miranda rights, brought to the station, and read his rights again.

On appeal, the defendant argued that the warrantless search and seizure violated his state and federal constitutional rights. The Supreme Judicial Court disagreed and affirmed the denial of the motion to suppress, holding that the father voluntarily consented to the police entry into the house. The court rejected the defendant's claim that because the police did not inform his father that he could refuse to consent to the entry, the consent was invalid. That fact may be "considered on the issue of voluntariness, but is not determinative of the issue". The court further rejected the defendant's probable cause argument because "probable cause is not required when the police have consent to conduct a search and seizure". In any event, the court noted that based on the matched fingerprints in conjunction with the cuts on the defendant's face and hands, the police had probable cause to arrest him.

Suppression order affirmed where anticipatory warrant insufficient. Commonwealth v. Callahan, 41 Mass. App. Ct. 420 (1996).

Police requested an anticipatory warrant after receiving information from UPS custom agents

that a package containing controlled substances was addressed to a store in Quincy. The warrant was to be executed once a "controlled delivery" of the package was voluntarily accepted. The defendant's motion to suppress was allowed and the Appeals Court affirmed the suppression order because the warrant did not contain any triggering language, nor was the affidavit in support of the warrant attached, nor was it shown to the defendant before execution. The court reasoned that the warrant must clearly state when it takes effect.

Defendant's conviction reversed where anticipatory warrant insufficient. Commonwealth v. Gauthier, 41 Mass. App. Ct. 765 (1996).

Based on surveillance and controlled buys with a marijuana dealer, police suspected that a certain individual was supplying the drugs. As a result, the police applied for an anticipatory search warrant to be executed upon a large order being placed with the dealer, who would then go to the defendant's house. Upon exiting defendant's house, the dealer was to be searched and if marijuana was found on him, the warrant would be activated. The plan did not work as expected, however, because the dealer left the defendant's house through a back door and was not stopped until he had driven away from the house. Marijuana was found in the car.

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The court reversed the defendant's conviction because the warrant did not specify the triggering event, nor did it refer to the affidavit. Moreover, the affidavit was not attached to the warrant nor served on the defendant, nor mentioned to the defendant prior to executing the search. Finally, the court held that the police did not have probable cause to conduct the search without a warrant. The Commonwealth's petition for further appellate review is pending.

Defendant's drug conviction reversed where trooper's questioning should have ended after driver produced valid license and registration. Commonwealth v. Bartlett, 41 Mass. App. Ct. 468 (1996).

A state trooper, while on routine patrol, stopped a car for speeding. The driver pulled over when signalled, gave the trooper his license and the car's rental agreement in another person's name. The driver stated that he was on his way to pick someone up for a construction job. The trooper noticed that both the driver and the passenger wore electronic beepers and had no visible construction tools. Neither of the men made any furtive movements and the driver was cooperative. The trooper ordered the driver out of the car and questioned him further. In answer to the trooper's question as to whether there were drugs in the car, the

driver said "no". The trooper then ordered the passenger out of the car and at that point, noticed a small package containing cocaine. Both men were arrested.

The Appeals Court held that the stop for speeding was lawful, but that after the driver produced a valid license and registration, any further questioning, as well as any subsequent search, was unreasonable. The court cautioned that searches based on a "hunch" are impermissible.

Once threshold inquiry ended, officer's search of car, despite owner's consent, was impermissible. Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554 (1996).

An officer pulled over a car with five passengers based on a belief that the car was travelling erratically. The officer saw one of the back seat passengers bending over after being detained. The driver was asked to step out of the car and after determining that she was sober, the officer allowed her to return to the car. The officer then asked the passenger who had been bending over in the back seat to exit the car, and upon noticing marijuana, asked the owner if the car could be searched. The owner consented, and the officer discovered both marijuana and cocaine. The Appeals Court reversed the defendant's conviction, and held that the defendant's motion

to suppress should have been allowed in its entirety where the officer's threshold inquiry ended at the moment that he finished questioning the operator of the car. If the officer had safety concerns based on the passenger's furtive movements, he should have asked the passenger to exit the car initially rather than after the conclusion of his threshold inquiry of the driver. The owner's consent was immaterial.

#### B. Searches with a Warrant

Search warrants to intercept conversations held valid despite failure to particularize locations of anticipated conversations. Commonwealth v. Penta, 423 Mass. 546 (1996).

After an informant agreed to wear a body wire, state police troopers obtained two search warrants to intercept conversations between the informant and the defendant. The surveillance led to defendant's conviction for trafficking in cocaine. The Supreme Judicial Court held that because the interceptions qualified for the one-party consent exception to the wiretap statute under G.L. c. 272, § 99 B 4, the issuance of the warrants were authorized under G.L. c. 276, § 1 et seq., and under the common law, Commonwealth v. Blood, 400 Mass. 61 (1987).

The warrants were not invalid for failing to particularize where the

conversations would take place. The SJC determined that the warrants provided sufficient specifics given the circumstances: they described the parties and subject matter of the conversations to be recorded (drug and gambling transactions) and were limited to 7-day and 14-day periods. In addition, the court held that the Commonwealth did not have a duty to produce the informant as a witness because he was not in custody. The Commonwealth's obligations were met by providing the informant's last known address and by not interfering with defendant's access to him.

Denial of motion to suppress reversed where informant's reliability not sufficiently demonstrated. Commonwealth v. Reyes, 423 Mass. 568 (1996).

The defendant was convicted of trafficking in cocaine after the police, pursuant to a search warrant, seized a substantial quantity of cocaine, cash and associated distribution paraphernalia from his apartment. On appeal, a divided Supreme Judicial Court reversed the denial of the motion to suppress. A majority of the SJC determined that the affidavit in support of the warrant, based on a confidential informant's tip, failed to establish probable cause to support the warrant under the Aguilar-Spinelli test. Although passing on the question of whether the tip met the basis of knowledge prong, the SJC

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remarked that the "tip was devoid of details that would normally support a belief that the informant had actually been inside the apartment and obtained personal knowledge of illegal activities." Of greater concern to the court was that the tip "failed to show the veracity of the informant." The informant did not have a history of providing information that led to arrests and convictions, nor was his tip so detailed as to ensure its accuracy. In concluding that the investigation did not sufficiently corroborate the information in the tip, the SJC remarked that the police conducted no surveillance of activities at the defendant's address, and did not attempt to make any controlled purchases at that location. The additional undetailed information regarding the defendant's prior arrest for an unidentified crime with no stated disposition did not enhance the sufficiency of the affidavit.

Prior judicial authorization for use of a stun grenade during execution of a search warrant not required. Commonwealth v. Garner, 423 Mass. 735 (1996).

An armed robbery and rape occurred at a convenience store where jewelry and lottery tickets were among the items stolen. Later that day, the police learned that an individual was attempting to cash stolen lottery tickets. Police obtained a search warrant for the individual's home, and during the search arrested the individual. She

told the police that approximately one hour after the robbery, her boyfriend and his nephew came to her apartment, carrying a sawed-off shotgun and a handgun. They also had a large amount of money, several hundred lottery tickets and rings similar to those described by the rape victim. With this information, the police obtained a no-knock warrant to search the boyfriend's home. The police were aware that in addition to the two armed men, a pregnant woman with two small children might be in the apartment. The police planned to have one of the officers break a window and drop a stun grenade. The officer broke the window and dropped the stun grenade before looking inside. A four-year old child was in the bedroom. The police seized a sawed-off shotgun, ammunition, credit cards and jewelry.

The court held that the police methods in executing the warrant were reasonable. While it was regrettable that the device was deployed in the child's room, the court declined to require that police obtain prior judicial authorization for the use of a stun grenade. The stun grenade is just one of many devices by which an entry may be effected in a variety of difficult and dangerous situations.

Sexually explicit materials properly seized in execution of search warrant of home of defendant charged with sexual abuse of children. Commonwealth v. Halsey, 41 Mass. App. Ct. 200 (1996).

In a prosecution for sexual abuse of children, police officers' seizure of sexually explicit pictures and videotapes not particularly described in a search warrant was lawful, where police searched the defendant's home and car pursuant to a valid search warrant, the items seized were in plain view, and the officers had probable cause to believe that the materials bore a nexus to the crimes charged. Admitting the testimony of the victims and a police officer regarding the presence of these items in defendant's house did not create a substantial risk of a miscarriage of justice. Finally, the testimony of a therapist and fresh complaint witness did not improperly vouch for the victims' credibility, and testimony regarding the defendant's demeanor during questioning by police was properly admitted on the issue of the voluntariness of defendant's statements to police.

## II. PRIVILEGES

Grand jury testimony does not waive privilege against self-incrimination for trial testimony. Commonwealth v. Martin, 423 Mass. 496 (1996).

The victim of an armed assault identified his assailant to the police. At the grand jury, the victim's testimony was similar to the information which he had given to the police. However, prior to trial, the defendant claimed that the victim had told an investigator that his assailant had been masked, a point that had not been part of the victim's grand jury testimony.

At the trial, the victim claimed his privilege against self-incrimination, alleging that his trial testimony would subject him to perjury charges arising from his grand jury testimony. The trial judge reported two questions on this issue to the Supreme Judicial Court. In response, the Supreme Judicial Court declared that a witness who voluntarily testifies before the Grand Jury regarding an incriminating fact does not waive his privilege against self-incrimination at a subsequent criminal trial. The trial is considered a "separate" proceeding for the purposes of the "waiver by testimony" rule. In that situation, a witness may refuse to testify unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the

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answers cannot possibly tend to incriminate him. The privilege extends to answers that would not only support a conviction but furnish a link in the chain of evidence needed to prosecute.

If, however, the circumstances of the case do not clearly indicate a possibility of self-incrimination, a judge may decide whether a witness's silence is justified by an "in camera" review. This should be held only if the information available to the judge does not afford adequate verification of the witness's assertion of the privilege. The scope of the inquiry is narrow and only "opens the door a crack", sufficient to allow the judge to verify the privilege claim. The hearing is limited to the witness, his counsel, and the judge. A record should be kept, under seal, opened only for appellate review.

Social worker privilege applies to police officers providing peer counseling. *Bernard v. Commonwealth*, 424 Mass. 32 (1996).

A state trooper who worked full time as a peer counselor in the Employee Assistant Unit, provided counseling to another trooper who had allegedly been involved in a domestic violence incident. After that trooper was charged in a criminal prosecution, the Commonwealth sought to have the peer counselor testify about his

conversations with the defendant. The trooper refused and was found in contempt.

The Supreme Judicial Court explicitly held that the social worker privilege under G.L. c. 112, §§ 135A and 135B, applied to unlicensed social workers, such as police peer counselors, employed by state governmental agencies.

Attorney who alerted police that client may commit arson protected by attorney-client privilege from testifying at criminal trial about conversation with client. *Purcell v. District Attorney for Suffolk County*, 424 Mass. 109 (1997).

After a conversation with his client and extensive deliberation, an attorney notified police that his client had threatened to commit arson. The following day, when the client was being evicted, police found evidence of attempted arson and arrested the client. The District Attorney for Suffolk County subpoenaed the attorney to testify about the conversation with his client.

On appeal, the Supreme Judicial Court first noted that the attorney was permitted to reveal his client's criminal intention to the police under S.J.C. Rule 3:07, Canon 4, and DR 4-101 (C)(3). Moreover, the SJC noted that although the attorney was under no ethical duty to disclose his client's

potential crime, he did so in order to save lives and protect the public. The court then held that the crime-fraud exception to the attorney-client privilege applies only where a client seeks advice from an attorney in furtherance of a crime or to obtain assistance concerning the commission of the crime. Here, the evidence was insufficient to warrant a finding that the client consulted his attorney for the purpose of obtaining advice in furtherance of a crime. Accordingly, the District Attorney did not meet his burden of demonstrating that the crime-fraud exception applied to this particular situation.

### **III. CONFESSIONS/ ADMISSIONS**

Suppression order reversed where case was "pre-Rosario" and where delay in arraignment was not unreasonable. Commonwealth v. Butler, 423 Mass. 517 (1996).

The defendant was arrested on a Friday morning for breaking and entering into the dwelling of a murder victim. He waived his Miranda rights and in the early afternoon, made incriminating statements regarding the murder. The defendant signed a statement at approximately 1:15 p.m. By 3:00 p.m., after having made additional incriminating statements, he was charged with first degree murder. The next morning, he asked for an attorney, and at that point, all questioning stopped.

On Monday morning, the defendant was arraigned. He filed a motion to suppress his statements. The Superior Court judge found that the delay between arrest and presentment was unreasonable and granted the defendant's suppression motion.

The Supreme Judicial Court reversed. The SJC examined: 1) whether Miranda warnings had been given; 2) the circumstances, including the passage of time between the arrest and the inculpatory statements; and 3) the purpose and flagrancy of the official misconduct. The Supreme Judicial Court vacated the suppression order, reasoning that the defendant had waived his Miranda rights, that there was no coercion or intimidation to call into question the voluntariness of the statements, and the delay between arrest and presentment to court was not unreasonable. (It is important to note that this case arose before the "six-hour ruling" was established in Commonwealth v. Rosario, 422 Mass. 48 (1996)).

Interrogation of distraught woman who had come to police station seeking mental health commitment suppressed due to unique circumstances. Commonwealth v. Magee, 423 Mass. 381 (1996).

The defendant and her boyfriend went to the police station seeking assistance after a night of intense discussion concerning the

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death of her 28-day-old son. She asked the police to commit her to a mental health facility. After seven hours of questioning, she was involuntarily committed, and later arrested and charged with murder.

The Supreme Judicial Court held that her statements were properly suppressed by the trial judge. The court held that the defendant's waiver of her Miranda rights was involuntary because: 1) the officers continued to question her even after she repeatedly refused to answer questions; 2) the police's offer of a telephone in response to her claim that she did not know any lawyers was inadequate; 3) her exhausted and distraught condition indicated the involuntary nature of the waiver; and 4) her capacity for a knowing and voluntary waiver was overborne by the promise that she would receive mental health assistance only after she answered the officers' questions. The court further stated that even aside from the problems of the invalid Miranda waiver, the defendant's statements were involuntary because of the coercive nature of the interview, the withholding of medical care until answers were provided, and in light of her debilitated mental and physical condition.

A conviction cannot be based solely on evidence of a defendant's uncorroborated extrajudicial confession. Commonwealth v. Landenburg, 41 Mass. App. Ct. 23 (1996).

While in custody on unrelated charges, a defendant confessed to stealing merchandise from Lechmere. He told police where the items were, and said he had stolen them by removing stickers which activated the store's anti-theft system. The police found the items at the specified location. During trial, a Lechmere investigator testified about the anti-theft stickers, but he could not unequivocally state that the items recovered had been stolen from Lechmere. The court denied the defendant's motion for a required finding of not guilty and the defendant was convicted. He appealed, arguing that the Commonwealth had failed to sufficiently corroborate his confession.

The Appeals Court reversed, holding that a conviction cannot be based solely on evidence of a defendant's uncorroborated extrajudicial confession. To defeat a defendant's motion for a required finding, the Commonwealth must show some evidence besides the confession that a criminal act was committed by the defendant. Because there was no evidence that the items were actually stolen, the Commonwealth did not meet its

burden, and the trial court should have granted the defendant's motion for a required finding of not guilty.

Defendant's conviction affirmed where independent evidence sufficient to demonstrate that operating under the influence had occurred. Commonwealth v. Manning, 41 Mass. App. Ct. 18 (1996).

On his arrival at the scene of an accident, a police officer saw a car on a traffic island. The car had been soaked by firefighters, but was still smoldering. The defendant was standing alone across the street, about 30 feet away from the car, with a briefcase, gold bag and fishing tackle. In response to the officer's questions, the defendant admitted he was the operator of the car and said that the car was a rental. The officer arrested the defendant after he failed a field sobriety test and admitted he was drunk. He was convicted of operating under the influence. He appealed, claiming that the Commonwealth had failed to sufficiently corroborate his admission that he was the operator of the car.

The Appeals Court affirmed the conviction. The rule that extrajudicial confessions must be independently corroborated applies to admissions, and here, the Commonwealth sufficiently proved that the crime of operating under the influence had occurred. The defendant's location in proximity to the still-smoldering vehicle and his

knowledge of the fact that the car was a rental provided sufficient evidence to support an inference that he was the operator of the car.

#### IV. SENTENCING/PROBATION

Courts have authority to enter a continuance without a finding prior to trial over the Commonwealth's objection. Commonwealth v. Pyles, 423 Mass. 717 (1996).

The defendant was charged with assault with a dangerous weapon. He offered a plea of not guilty, together with a request that a guilty finding not be entered, and that the case be continued without a finding (CWOFF) for a period of one year. The Commonwealth objected and asked that a guilty finding be entered and the defendant serve a one-year term of incarceration, six months to serve with the balance suspended. Over the express objection of the Commonwealth, the court adopted the defendant's recommendation. The Commonwealth appealed, arguing that the CWOFF would effectively result in a nolle prosequi of the case over its objection which would be a judicial infringement on the district attorney's constitutional power to prosecute a criminal complaint. The Supreme Judicial Court disagreed, ruling that a CWOFF was not tantamount to a nolle prosequi, and further held that by enacting G.L. c. 278, § 18, the legislature had properly permitted courts to impose CWOFFs.

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Courts may not impose a continuance without a finding after trial over the Commonwealth's objection. Commonwealth v. Norrel, 423 Mass. 725 (1996).

After a bench trial on a disorderly conduct charge and over the Commonwealth's objection, the trial judge ordered the defendant's case be continued without a finding (CWOFF) for a period of one year. The Commonwealth appealed, and the Supreme Judicial Court held that a CWOFF is not an authorized disposition after trial, and cannot be imposed over the Commonwealth's objection.

A defendant's probation may be revoked based on criminal conduct occurring after the imposition of sentence but before the start of the probationary period. Commonwealth v. Phillips, 40 Mass. App. Ct. 801 (1996).

The defendant was convicted of sexually assaulting the daughter of his second wife. He received a 20-year Concord sentence, and three concurrent terms of 9-10 years at Cedar Junction from and after the Concord sentence, suspended with probation for 9 years. While serving the Concord sentence, the defendant solicited a "hit man" (who was an undercover state trooper) to murder his second wife in exchange for anticipated proceeds from the sale of her house after her death.

The defendant was convicted of the crime. Following his conviction, the Commonwealth initiated proceedings to revoke probation. The Appeals Court concluded that the defendant may be subject to probation revocation based upon criminal conduct occurring after the imposition of the sentence to probation, but before the probationary period had begun.

## V. CRIMINAL STATUTES INTERPRETED

Pretrial preventive detention provisions apply to juveniles. Victor V. v. Commonwealth, 423 Mass. 793 (1996).

A juvenile was held in pretrial detention pursuant to G.L. c. 276, § 58A. His petition to a single justice for release on bail was denied and he appealed. The SJC held that § 58A applies to all individuals charged with a felony, including juveniles. The court also rejected the juvenile's claim that § 58A, which does not allow bail for dangerous offenders, was precluded by G.L. c. 119, § 68, which allows pretrial detention of juveniles who cannot furnish bail. Finally, the SJC rejected Victor V's claim that § 58A is at odds with the rehabilitative goals of the juvenile justice system.

Defendant's conviction for possession of firearms, rifles and shotguns upheld where "use" exemption not applicable.  
Commonwealth v. Bachman, 41 Mass. App. Ct. 757 (1996).

At a trial of an indictment charging 44 counts of possession of firearms, rifles and shotguns in violation of G.L. c. 269, § 10A, where the evidence did not permit the conclusion that the defendant's holding of the weapons was temporary, he was not entitled to the "use" exemption set forth in G.L. c. 140, § 129C(m). Consequently, the defendant's claim on appeal that his attorney was ineffective for failing to assert the statutory exemption as a defense was rejected by the Appeals Court.

Mayhem conviction reversed where Commonwealth failed to prove specific intent to maim.  
Commonwealth v. Cleary, 41 Mass. App. Ct. 214 (1996).

The defendant was convicted of mayhem and assault and battery by means of a dangerous weapon arising from a fight in which the defendant struck the victim in the eye with an ax handle, resulting in severe injuries. The Appeals Court reversed the mayhem conviction, holding that the Commonwealth was unable to show the "sustained and atrocious attack" necessary to permit an inference that the defendant had the intent to disfigure or maim the victim. The court upheld the

conviction for assault and battery by means of a dangerous weapon, finding appropriate the trial judge's instruction to the jury that the conviction may rest on reckless, as opposed to solely intentional, conduct.

Concrete paving does not constitute a dangerous weapon.  
Commonwealth v. Sexton, 41 Mass. App. Ct. 676 (1996).

The defendant was convicted of assault and battery by means of a dangerous weapon on a joint venture theory arising from a fight in which the defendant's brother smashed the victim's head against the ground. The Appeals Court reversed the portion of the conviction resting on the defendant's use of a dangerous weapon, holding that concrete pavement does not meet the statutory definition of a dangerous weapon under G.L. c. 265, § 15A. The court noted that in future cases, the Commonwealth could charge assault with intent to murder or maim or disfigure pursuant to G.L. c. 265, § 15, or assault with intent to kill under G.L. c. 265, § 29. The case was remanded to the Superior Court for resentencing for assault and battery. The defendant's conviction for malicious destruction of property was affirmed.

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Appeals Court reverses judgments of conviction for motor vehicle homicide and operating a motor vehicle so as to endanger where evidence insufficient to prove public nature of road on which accident occurred. Commonwealth v. Smithson, 41 Mass. App. Ct. 545 (1996).

The defendant was a guest at a Memorial Day party held at a sand and gravel pit where "junk cars" were provided for driving on the facility grounds. The defendant overturned one of these junk cars on the gravel haul road within the facility's boundaries, killing one of the passengers. He was charged with motor vehicle homicide and operating a motor vehicle so as to endanger. The defendant's motion for a required finding of not guilty, based on the road's inaccessibility to the public, was denied.

The Appeals Court held that the road upon which the defendant was travelling did not constitute one "to which members of the public have access as invitees or licensees" within the meaning of the applicable statutes. The court explained that it is the objective appearance of the road that determines its status, rather than the owner's subjective intent. On the day of the party, Memorial Day, the court concluded that the public did not have a reasonable expectation that they were welcome on the property. The court pointed to the

facts that the entrance to the road was gated, albeit open, and a sign at the entrance posted the business hours of the sand and gravel pit.

Defendant's conviction for possession of burglarious instruments reversed where a locked bicycle held not to be a "depository". Commonwealth v. Hogan, 41 Mass. App. Ct. 73 (1996).

The defendant discarded a backpack containing 18" bolt cutters and a wire cutter and fled after he noticed police officers observing him approach and stop at a locked bicycle. The Appeals Court reversed the defendant's conviction for possession of burglarious instruments, holding that a locked bicycle was not a "depository" as defined under G.L. c. 266, § 49.

Defendant's conviction for armed robbery while masked reversed where apparel worn did not constitute a "mask or disguise". Commonwealth v. Santos, 41 Mass. App. Ct. 621 (1996).

The defendant robbed a bank on a summer morning while wearing a baseball cap, sunglasses, and a band-aid on one cheek. His motion for a required finding on the "masked" portion of the indictment was denied. The Appeals Court reversed, holding that the defendant's apparel was common and given the factual circumstances,

did not satisfy the element of "masked or disguised" within the meaning of G.L. c. 265, § 17.

## **VI. PRE-TRIAL/EVIDENTIARY ISSUES**

SJC reverses defendant's conviction where colloquy on voluntariness of jury trial waiver was not conducted. Commonwealth v. Pavao, 423 Mass. 798 (1996).

The defendant opted for a jury waived trial after which he was found guilty of indecent assault and battery on a child. Prior to the start of the trial, the defendant signed a written waiver of his right to a jury trial. The judge did not conduct, nor did the prosecutor request, a colloquy to determine the voluntariness of the waiver. Following the verdict, both the court and the Commonwealth realized the oversight at which time the Commonwealth requested a post-verdict colloquy, or in the alternative, a finding that the defendant had acted voluntarily when the waiver occurred. The trial judge declined to conduct the colloquy but noted for the record a variety of factors tending to indicate that the defendant's waiver had been voluntary. Defense counsel conceded both that the waiver had been voluntary and that counsel had been aware of the oversight at the start of the trial but had not believed it was his duty to point out the error.

The Supreme Judicial Court concluded that the requirement that

a judge conduct a colloquy to determine a defendant's voluntariness in waiving the right to a jury trial is a matter of "sound judicial administration", and cannot be considered harmless error when overlooked nor can be cured by an examination of other factors in the record. Consequently, the SJC reversed the judgments of the lower court. In so doing, however, the court indicated that defense counsel's actions, in purposefully not bringing the oversight to the attention of the trial court, may have exceeded the bounds of "zealous representation" and invited the Board of Bar Overseers to consider amending the rules of professional conduct so as to explicitly apply to such actions.

Evidence of blood alcohol test results not admissible when conducted for non-medical purpose. Commonwealth v. Sheldon, 423 Mass. 373 (1996).

At a trial for operating under the influence, the trial judge excluded a hospital record containing the blood alcohol test results on the grounds of hearsay. Relying on the treating physician's testimony, the lower court found that "(1) the only purposes in conducting the blood alcohol test was to prove the defendant's sobriety, and (2) there was no set hospital protocol for conducting such a test". On appeal, the Supreme Judicial Court affirmed, reasoning that "the information concerning the amount of alcohol in

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the defendant's blood was not obtained ... to assist in the achievement of any medical goal." The SJC distinguished the decision in Commonwealth v. Dube, 413 Mass. 570 (1992), where such test results were obtained as a result of a "routine medical practice". The SJC further held that although the record of the tests was properly excluded as inadmissible hearsay, other "lawfully obtained competent evidence of the test results", such as testimony by the person administering the test, might be admitted.

Witness's eavesdropping of telephone conversation between mother and defendant did not require suppression.  
Commonwealth v. Vieux, 41 Mass. App. Ct. 526 (1996).

The defendant appealed his rape conviction claiming that his attorney was ineffective for failing to suppress testimony from a witness who had surreptitiously listened to a conversation between her mother and the defendant on an extension telephone. The Appeals Court concluded that this type of eavesdropping within the home, although arguably an invasion of privacy, was outside the intended scope of state and federal wiretap statutes. Accordingly, defense counsel was not ineffective for failing to raise a futile claim.

Complaint for operating while under the influence dismissed where citation not issued in timely manner.  
Commonwealth v. Riley, 41 Mass. App. Ct. 234 (1996).

On October 24, 1993, a police officer issued a citation for failure to keep to the right, speeding and operating so as to endanger. Before trial, the prosecutor learned, via hospital records, that the defendant had a blood alcohol level of .20 percent upon her admission to the hospital. Several months later, after disposition of the motor vehicle offenses, a complaint was sought charging the defendant with operating under the influence. A few days later, the police issued a citation by mail to the defendant for the OUI. A clerk-magistrate suggested that the application for a complaint charging the defendant with OUI might be denied based on the police's failure to issue a timely citation to the defendant, as required by G.L. c. 90C, § 2, but noted that a private citizen could file such an application without regard to the timeliness of a police citation. As a result, the Commonwealth withdrew the application for a complaint, and one of the occupants of the car which had collided with the defendant's car applied for a criminal complaint. The complaint was issued and the defendant filed a motion to dismiss on the ground that the complaint was barred by the

failure of the police to issue a timely citation. The district court allowed the motion.

The Appeals Court upheld the dismissal, concluding that although a private citizen is permitted to initiate a complaint without proof that a citation had been issued to the violator, such a procedure cannot be used to circumvent the strict requirement of G.L. c. 90C, § 2, that the police give prompt notice of a violation to the violator.

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# Law Enforcement Newsletter

Office of the Attorney General  
for the Commonwealth of Massachusetts



Scott Harshbarger  
Attorney General

(617) 727-2200

GOVERNMENT DOCUMENTS  
COLLECTION

SUMMER, 1997

AUG 22 1997

## LETTER FROM THE ATTORNEY GENERAL

Office of the Attorney General  
Commonwealth of Massachusetts  
Depository Copy

### I. INTRODUCTION

Welcome to the Summer edition of the Law Enforcement Newsletter. This issue introduces my new High Technology Crime Unit, highlights information concerning civil liability for public employees and employers with regard to high speed police chases, and provides an update on domestic violence news as well as the six-hour rule for questioning suspects post-arrest and pre-arraignment.

### II. HANDGUN SAFETY

This fall, the first consumer protection regulations in America designed to promote handgun safety will begin to take effect in our Commonwealth. The rules authored by my office, through the work of my Consumer Protection and Antitrust Division, will effectively ban the sale in Massachusetts of "junk" handguns, and will require all handguns sold in our state to include child-proofing features, tamper-proof serial numbers and detailed consumer safety warnings. By issuing these regulations, I am pushing forward to stem the tide of handgun violence in Massachusetts, to prevent handgun tragedies among our children, to make legal handguns safer for law-abiding citizens, and to make life a little bit safer and easier for law officers.

Firearms are the second leading cause of injury-related death to children and adolescents in Massachusetts. In 1994, more than 160 Massachusetts children were hospitalized for injuries. Nationally, firearms are the fourth leading cause of accidental death in children ages 5 to 14. Data compiled by the Massachusetts Department of Public Health indicates that three of the top five types of pistols submitted for ballistics tests in criminal cases in Massachusetts are so-called "junk guns," also known as "Saturday Night Specials," manufactured primarily by the "Ring of Fire Companies" in the Los Angeles area.

A 1995 study by the Boston Police Department and the federal Bureau of Alcohol, Tobacco and Firearms described "junk guns" as the "handgun of choice for

juveniles" in Boston. Federal research found that they account for seven of the top 10 guns traced in criminal cases in America today. Under these landmark new rules, for the first time anywhere, handguns sold in Massachusetts will face the same common sense consumer safety standards as baby rattles, bicycles, and a host of other more, mundane products. It's about time. The regulations spell out specific, scientific minimum quality standards that all handguns will have to meet to be sold legally to Massachusetts consumers. They also detail the steps necessary to make all handguns sold here child proof and their serial numbers tamper proof.

Approximately 30 common types of handguns, most of them .22 or .25-caliber weapons, would likely be barred from sale here for failing to win certification under these tests. None are currently made in Massachusetts. I am confident these new rules can be met by every legitimate handgun maker and retailer without hardship.

When I hosted a public hearing on this proposal last November, some members of the gun lobby complained that I should be paying more attention to gun safety and education issues. I don't expect to hear those complaints any more. Beginning October 1, every handgun sold in this state will come with a detailed, written consumer safety warning, and every handgun buyer will receive a firsthand demonstration on the safe use and secure storage of weapons. I think everyone agrees that if there's any product that should come with consumer safety warnings, it's a handgun. Under the new regulations, serial numbers will be required to be duplicated either in a location on the interior of all handguns sold in Massachusetts that would not be known to anyone except gun sellers and law enforcement, or on the exterior of handguns in a way that is invisible to the naked eye.

I am very proud and excited about what these regulations will accomplish. By next June, dangerous and defective "junk guns" will no longer be allowed on the market in Massachusetts. Every new handgun sold here will be safer for owners and, especially, for children. Every new handgun buyer here will understand the ramifications of his or her purchase, and, every stolen handgun here will be easier for law enforcement to trace. Today, we are doing what no other state has done, but what every state should do. We are blazing a trail not only for other states, but also for Congress to follow -- a trail built on a single goal: take sensible steps right now to make legal handguns as safe as they possibly can be for law-abiding citizens and for our children.

No one will ever know precisely how many lives will be saved, crimes prevented or needless tragedies averted because of these regulations. And, sadly, they will not achieve what we all would like to see: an absolute end to handgun crime, violence and accidental tragedies in our state and throughout our nation. But they are an historic step toward a comprehensive solution. We can only hope that others will follow our lead and, by doing so, move us all closer to that goal.

# Law Enforcement Newsletter

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## III. URBAN VIOLENCE

In an effort to arm our cities and towns with a new and comprehensive tool in the fight to stop violence, I released a 700-page Urban Violence Prevention Resource Directory. Targeting community leaders, educators, law enforcement officers, and health and human service professionals, the Attorney General's office has mailed more than 2,500 copies of the Directory in an effort to strengthen ongoing prevention initiatives, encourage networking and provide model programs for those communities -- urban, suburban or rural -- searching for solutions.

The Directory, which is the first resource in the state to compile violence prevention programs in one location, lists more than 500 program entries, which vary from advocacy projects and after-school programs to domestic violence programs and alcohol/drug treatment centers, to mediation services and life skills trainings. Program entries, which were chosen as the result of a statewide survey done in cooperation with the Massachusetts Department of Public Health, include information on program goals, services offered, materials used, target populations, languages spoken, and the listing of any hotline numbers available to the public.

The fight against violence has been one of my highest priorities, and everyone in the Massachusetts law enforcement community can share credit for the historic crime reductions our state has enjoyed in recent years. One of the best ways we can prevent violence in our communities is through efforts that address the underlying causes. That's why I consider this directory an asset for any community, large or small.

For a copy of the Urban Violence Prevention Resource Directory, please contact my Publications Office at (617) 727-2200, ext. 2674.

## IV. CONCLUSION

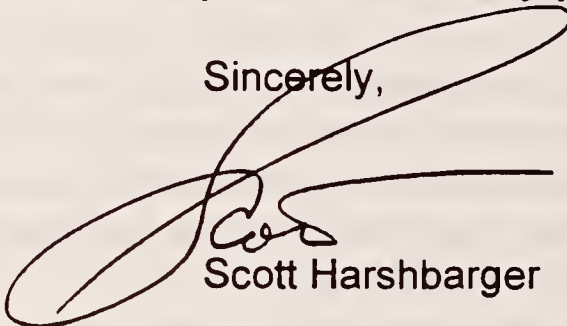
On a personal note, I just want to take a moment to urge everyone to enjoy the remainder of their summer and to make it a point to relax with family and friends.

Law enforcement officers have a difficult, dangerous and often thankless job. You are on the front lines every day, not only in terms of risking your lives, but also as the true public face of law and order. People whom you have never met rely on you. They expect you to make quick decisions; to render wise, Solomonesque judgments; to instantly determine right from wrong and good from bad; to provide them with protection and leadership. Your gun, your badge and your oath bestow upon you a tremendous power over the lives of the citizens you are sworn to protect and serve. We have the responsibility to use that power wisely -- to enforce the law and to impose order -- and to do both of those without violating anyone's civil rights or losing the respect of the citizenry you serve.

We get much of the blame when things go wrong, and little credit when things go right. Fair or not, we are government in action at its most basic level, and our actions cast a far larger reflection upon the complex landscape of public perception. Our profession must be more than simply another job. Unlike the occupations of most of our friends, family or acquaintances who are not in law enforcement, we go to work everyday to face a new set of challenges that will, more often than not, connect us in a very personal and intimate way to lives of the people for whom we work. That's a lot of stress and a lot of responsibility. And, that is why it is so important to try to get away from the demands of the job from time to time.

Taking advantage of appropriate opportunities to relax and recharge will not only make you a better law enforcement officer, but will also go a long way toward making you a better person for loved ones, family and friends. Enjoy!

Sincerely,

A handwritten signature in dark ink, featuring a large, stylized 'S' and 'H' that are interconnected. The signature is written over the word 'Sincerely,' and the name 'Scott Harshbarger'.

Scott Harshbarger

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# DOMESTIC VIOLENCE UPDATE

Joseph Whalen  
Assistant Attorney General  
Amy Seeherman, Ph.D.  
Research and Policy Analyst  
Family and Community Crimes Bureau

## RECENT COURT DECISIONS

### RESTRAINING ORDER REGISTRY - EXPUNGEMENT OF RECORDS

**L**egal challenges to the maintenance of restraining order records on the statewide Registry of Civil Restraining Orders were recently rejected by the Supreme Judicial Court. In Vaccaro v. Vaccaro, 425 Mass. 153 (1997), an appeal by the Department of Probation of an order by a District Court that the defendant's entry on the Registry be expunged, the Court held that there was no express statutory, implied or inherent authority to expunge such a record. In so holding, the SJC noted that the Registry was "designed to promote the goal of preventing abuse ... by providing a judge (and other authorized agencies) with complete information about a defendant," and that judicial power of expungement would be inconsistent with such a purpose. The Court went on to reject the defendant's constitutional challenge, holding that an individual's due process rights are not violated by the legislative requirement that all restraining order records be maintained and made available to those issuing and enforcing new restraining orders. As a result of the decision, the District Court's expungement order was vacated, and the lower court was ordered to deny the defendant's expungement motion.

### STALKING

In Commonwealth v. Cruz, 424 Mass. 207 (1997), the Supreme Judicial Court upheld a defendant's convictions for the stalking and first degree murder of his former girlfriend. Prior to shooting the victim, the defendant had engaged in a pattern of conduct that included choking and slapping the victim, demanding to see her, coming to her apartment on a daily basis and beeping his horn or ringing the doorbell, and angrily confronting her hours before killing her. In affirming the stalking conviction, the Court held that such conduct constituted a "pattern of aggression and violence toward the victim [that] created a reasonable apprehension on her part that she was in danger of imminent physical harm."

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## EVIDENTIARY ISSUES

In the context of the murder conviction in Cruz, the Court also held that evidence of prior domestic violence incidents involving the defendant, including threats, abuse and harassment of the victim, and her intention to separate from him, were admissible on the question of the victim's state of mind. The Court noted that there was evidence that the defendant knew of the victim's mental state, thus rendering such evidence relevant to the defendant's motive for killing her.

In contrast, however, in Commonwealth v. Cyr, 425 Mass. 89 (1997), the SJC held that a domestic violence homicide victim's hearsay statement that she was in fear of the defendant was not admissible on the question of the defendant's motive. There, the SJC noted that the issue at trial was not whether the defendant had killed the victim, but rather the degree of his culpability. Under such circumstances, including the fact that there was other admissible evidence regarding an escalating conflict between the parties, the Court held that admission of the hearsay statements undermined the defendant's defense as the statements may have been improperly considered by the jury in determining culpability.

## EXCITED UTTERANCES

Admission at trial of statements made by a victim of assault and battery that are sufficiently spontaneous and explanatory of the assaultive incident does not violate a defendant's right to confrontation, according to the Appeals Court. In Commonwealth v. Napolitano, 42 Mass. App. Ct. 549 (1997), the prosecution's case rested almost entirely on hearsay statements of a domestic violence victim made to several persons immediately following an assault by her boyfriend, in addition to observations made by those witnesses. The victim's statements revealed that the defendant had attempted to drown her and had "bashed" her head on a rock in the process. At trial, the victim testified on behalf of the defendant, denying that she had been assaulted, and attributing her previous statements to her anger at the defendant about another woman, and her effort to "get him into trouble." Visible injuries to the victim that were observed by witnesses were explained by the victim to have been the result of her slipping and falling while she attempted to attack the defendant. Despite this testimony, the defendant was convicted of assault and battery with a dangerous weapon.

The Appeals Court ruled that the victim's statements were admissible under the "excited utterance" exception to the hearsay rule because, while they may not have been strictly contemporaneous with the exciting event, they were made within moments of it, and while the victim remained in an agitated and nearly hysterical state. The Court also noted that her statements related to, characterized and explained the underlying event -- namely, the assault by the defendant. Admission of these statements as

"spontaneous exclamations," which the Court noted was a "firmly rooted exception to the hearsay rule," did not require the prosecution to demonstrate that the witness was otherwise unavailable, nor did it violate the defendant's right to confrontation under Article 12 of the Declaration of Rights. As the Appeals Court noted, the victim did testify and was subject to examination by the defendant.

Note: This case again underlines the importance of documenting, in detail, statements made by a victim when police respond to an incident, as well as detailing observations of a victim's physical appearance and demeanor.

### BATTERED WOMEN'S SYNDROME

While typically utilized by defendants charged with murder of an abusive spouse or partner, expert testimony on Battered Women's Syndrome (BWS) may also be introduced by the prosecution to explain seemingly inconsistent behavior by a domestic abuse victim toward her abuser. In Commonwealth v. Goetzendanner, 42 Mass. App. Ct. 637 (1997), the Appeals Court approved the use of such testimony to explain why a victim, who had tried to end her relationship with the defendant many times, was still involved with him at the time of trial. In the absence of such testimony, the Appeals Court observed that the average juror might see the victim's behavior as counterintuitive and a reason to find her version of events unreliable. The Appeals Court noted that the expert did not examine, nor offer a specific opinion about, the actual victim in the case, but instead offered general information about domestic violence and the characteristics of women with BWS. The Appeals Court reasoned that it would subvert the interests of justice to deny the use of BWS evidence to a victim seeking redress for her injuries through the legal system, only to allow it when she finally takes matters into her own hands and is on trial for striking back at her batterer.

For more information regarding the use of Battered Women Syndrome evidence in a prosecution's case-in-chief, contact Berkshire County Assistant District Attorney Anne Kendall at (413) 443-5951.

### ARRESTS FOR VIOLATION OF A RESTRAINING ORDER

The First Circuit Court of Appeals has held that police officers pursuing an individual for whom they have an arrest warrant for violation of a restraining order may enter a third party's home to effectuate the arrest. In Joyce v. Tewksbury, 112 F.3d 19 (1st Cir. 1997), police officers and the town were sued by the parents of the suspect, in whose home the suspect was arrested, claiming that the entry constituted an unreasonable search and seizure. The suspect did not reside in the parents' home at the time of the arrest. The officers had communicated with the suspect at a side door of the home, informed him of the outstanding warrant, and asked him to step outside.

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When the suspect indicated that he would not cooperate, and retreated into the home, the officers opened the side storm door and followed him into the house where he was arrested.

The First Circuit ruled that while a search warrant is generally required to enter the home of a third party in order to execute an arrest warrant, the officers' conduct in this case was reasonable due to the exigency of the situation. The Court held that the circumstances of the entry fell within the "hot pursuit" exception to the warrant requirement. The Court noted that the officers initiated the arrest from outside the home, and only entered it in the course of chasing the arrestee inside. The Court further ruled that while "hot pursuit" usually involves a fleeing felon, the charge of violating a restraining order is "a serious underlying crime that adequately contributes to the kind of exigency captured in the phrase 'hot pursuit of a fleeing felon'."

## INTERSTATE ENFORCEMENT UPDATE

As noted in a previous edition of the LEN (August/September 1996), restraining or protective orders issued in other states are now fully enforceable in Massachusetts. G.L. c. 209A, §5A. Accordingly, police officers must arrest any defendant whom they have probable cause to believe has violated the vacate, refrain from abuse, no contact or firearms surrender provisions of an out-of-state restraining order. G.L. c. 209A, §6(7).

When this obligation is triggered, however, police officers may often be confronted with a situation where the defendant has fled the state. If this occurs, it is important to note that while the statutory charge of violation of a protection order issued by another jurisdiction is a misdemeanor under Massachusetts law, it remains an extraditable offense under the provisions of the Uniform Criminal Extradition Act (codified in Massachusetts at G.L. c. 276, §§ 11 - 20R). The uniform act has been adopted by virtually every state in the country, including all the New England states. While a specific state's provisions would control, as a general matter under the act, an officer of another state may arrest a defendant without a warrant "upon reasonable information that the accused stands charged in [Massachusetts] with a crime punishable ... by imprisonment for a term exceeding one year." G.L. c. 276, §20B; U.C.E.A. §14. Violation of a protection order issued by another jurisdiction is punishable in Massachusetts by imprisonment for up to two and one-half years in the house of correction. G.L. c. 209A, §7.

The warrant should be listed with the National Crime Information Center (NCIC) in order to notify other states of its existence and the intent to extradite the individual. Prior to entering the information in NCIC, you should contact the appropriate

prosecuting authority for approval to extradite upon apprehension. Once arrested, rendition proceedings would follow in the normal course, including the request for and issuance of a governor's warrant. See G.L. c. 276, §§12 - 16.

In the case of an out-of-state violation of a restraining order issued by a Massachusetts court, Massachusetts authorities need not necessarily rely upon enforcement of the order by the state where the offense was committed, even though it is unclear whether a statutory charge under G.L. c. 209A, §7 may be brought. The offense can certainly be prosecuted in Massachusetts as a charge of criminal contempt. While G. L. c. 277, §62A provides that a criminal violation of chapter 209A "may be prosecuted and punished in the territorial jurisdiction ... in which the original [209A order] was issued," this may well be regarded as merely a venue statute that does not confer jurisdiction. See Commonwealth v. DiMarzo, 364 Mass. 669 (1974). Although it still might be argued that the alleged violation of an order issued by a Massachusetts court, while committed in another state, has sufficient "detrimental effect" within the state (as a result of the affront to the court's authority) to provide jurisdiction in Massachusetts, see Commonwealth v. Levin, 11 Mass. App. Ct. 482 (1981), the safer course would be to prosecute the offense as a charge of criminal contempt.

Rule 44 of the Massachusetts Rules of Criminal Procedure provides for the prosecution of criminal contempt complaints. As opposed to statutory crimes, which are offenses against the state, criminal contempt is "an offense against the court," Hurley v. Commonwealth, 188 Mass. 443 (1905), and "can be alleged and prosecuted, even when it allegedly occurs in another state." Massachusetts Trial Court, Abuse Prevention Guidelines, Guideline 8:02. (See commentary to Guideline 8:02 for suggested charging language.) Like its statutory counterpart, criminal contempt is a misdemeanor, punishable by up to two and one-half years in the house of correction. G.L. c. 220, § 14; G.L. c. 279, §23. Once a warrant has issued for the offense, coordination with any enforcement efforts by the state in which the act was committed is clearly indicated.

In any domestic violence case involving a victim or defendant moving across state lines, an analysis should be done as to whether prosecution may be appropriate under any of the several federal domestic violence statutes. See, e.g., 18 U.S.C. 2261 (causing bodily harm across state lines); 18 U.S.C. 2261A (interstate stalking); 18 U.S.C. 2262 (violation of protective order across state lines). The United States Attorney for the District of Massachusetts has assigned a prosecutor with primary responsibility for the review, investigation and prosecution of such cases in appropriate circumstances. Should you encounter a case with an interstate component, you are encouraged to contact Assistant United States Attorney Marianne Hinkle at (617) 223-9437.

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## RECENT RESEARCH

The remainder of this column is devoted to a summary of a compilation of research about domestic violence entitled "Violence in Marriage: Until Death Do Us Part" by Angela Browne in Violence Between Intimate Partners: Patterns, Causes and Effects, a volume edited by Albert P. Carderelli of the University of Massachusetts-Boston. Some of the sub-headings used by the author are also used in this review to organize the extensive research findings.

### I. INCIDENCE, PREVALENCE, AND SEVERITY OF MARITAL VIOLENCE

#### A. PHYSICAL ASSAULT

In the United States, a society with a high incidence of violence, women are more likely to be victimized at the hands of someone who is an intimate partner such as a spouse, former spouse, partner or former partner, than a stranger. In the second national representative survey of violence in families conducted in 1985, the findings of the survey indicated that nearly one out of eight husbands had physically assaulted their wives during the twelve months prior to the survey, and one-third of these assaults involved significant aggression (Straus and Gelles, 1990). Extrapolating from these figures, it can be concluded that approximately two million women in the United States are physically assaulted by male partners each year. Because of the manner in which these statistics were gathered, the researchers contend that these figures truly underestimate the actual incidence of the problem.

#### B. THE QUESTION OF MUTUAL VIOLENCE

A considerable amount of controversy surrounds the question of mutual violence in intimate relationships. In particular, based on men's and women's responses to the Conflict Tactics Scale (CTS: Straus, 1990), some researchers have reported that most abusive relationships involve mutual battering and that women as well as men are perpetrators of violence in couple relationships (Straus and Gelles, 1990; Stets and Straus, 1990). However, the author notes that this conclusion be interpreted with extreme caution. The surveys asked if respondents had engaged in even one of the behaviors listed on the Conflict Tactics Scale -- pushing, shoving, slapping, kicking, hitting, beating up, etc. -- even one time during the relationship, and the results of the same surveys (Straus and Gelles, 1990; Stets and Straus, 1990) also indicated that:

- ◆ "Men perpetrate more aggressive actions against their female partners than women do against their male partners.

- ◆ Men perpetrate more severe actions (e.g., punch, kick, threaten or use a gun). Men are more likely to perpetrate multiple aggressive actions during a single incident.
- ◆ Women are much more likely to be injured during attacks by male partners than men are during attacks by female partners" (Browne, 1996:51).

While males as well as females no doubt engage in physically aggressive behaviors, it is critical to recognize that not all violence is the same and there are "significant differences between initiating violence, using violence in self-defense, and retaliating against an abusive partner" (Renzetti, 1996:75). Based on other research studies, investigators have reported that cases of mutual battering are "far fewer" than the aforementioned researchers have reported (Renzetti, 1996:76). If the term "violence" includes behaviors such as sexual aggression, threats to kill, and physical aggression with the clear intent to harm, then men are overwhelmingly the major perpetrators of violence in interpersonal relationships. It is clear that further research is needed to clarify some of the issues raised in this debate.

#### C. PHYSICAL OUTCOMES OF PARTNER VIOLENCE

Research has shown very large discrepancies in the severity of the injuries that men and women sustain as a result of domestic violence. Women are more likely to be the victims of injurious or life-threatening assaults by their male partners, while men are at greater risk of severe violence by male acquaintances or strangers. Women sustain a variety of injuries as a result of interpersonal violence including cuts, bruises, broken bones, burns, hearing or vision loss, miscarriages, permanent or internal injuries and even death (Browne, 1987). In fact, women who have been attacked by males partners suffer from multiple injuries and injuries to the head, chest and abdomen - injuries that are seen very infrequently in male victims of interpersonal violence committed by their female partners.

#### D. LETHAL OUTCOMES OF PARTNER VIOLENCE

Men commit the majority of homicides in this country. More specifically, 88.5% of all homicides perpetrated by adults are committed by men, while women are the perpetrators in 11.5% of all homicides committed by adults. Women are less likely to commit lethal assaults, but when they do kill, their male partner is the most likely victim. Closer examination of homicide data from specific cities and counties across the United States indicated that many women kill their intimate partners as a result of their partners' violence and threats, particularly if they believe that their children will be hurt (Browne, 1987). Researchers have hypothesized that the availability of resources to allow women to escape from battering relationships may result in a reduction of homicides committed by women against their male partners. In fact, an analysis of

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national trends in partner homicide from 1976 through 1984 indicated that indeed, states with domestic violence legislation and protective services such as battered women's shelters, hotlines, support groups and legal advocacy had lower rates of partner homicide by women.

## *E. SPECIAL RISK FACTORS: POVERTY AND ETHNICITY*

Women from different cultural groups and impoverished women are at greater risk to become victims of severe and lethal assaults by their male partners. However, it is socio-economic variables such as family income and the husband's occupation, rather than race, that account for differences in rates of interpersonal violence. The higher risk of domestic violence that women from economically oppressed minority populations face can in part be attributed to an absence of economic resources, and a dearth of protective services in their communities - two factors which inhibit their ability to escape the violence in their lives. Language and cultural barriers often prevent battered women from minority populations from accessing the systems and services that they need to change their circumstances to live in safety.

## **II. THE CONTINUUM OF MARITAL VIOLENCE: FROM INTRUSION TO HOMICIDE**

Interpersonal violence in couple relationships includes a variety of behaviors ranging from intense criticisms and verbal harassment to physical intimidation, threats and physical and/or sexually assaultive acts. The onset of physical aggression in relationships is often preceded by nonviolent verbal abuse and "victims of domestic violence have noted that verbal harassment is often more emotionally painful and damaging than the physical attacks" that they endure at the hands of their assaultive partners (Jones and Schechter, 1992; Walker, 1979). Researchers have noted that once the physically aggressive behavior begins, it often becomes a chronic feature of the relationship (Straus, Gelles and Steinmetz, 1980; Walker, 1984). In addition, women face increased danger following separation; in fact research has revealed that the most dangerous time for a victim of domestic violence is when she attempts to sever her relationship with the batterer. An abuser will attempt to prevent his partner from leaving, force her to return and may even retaliate against her after she had separated from him (Ptacek, 1997). Also, batterers threaten that they will take custody of the children or even kidnap or harm the children when they fear that their partner is attempting to end the relationship (Browne, 1997).

#### A. ONSET OF VIOLENCE

Women who have been the victims of domestic violence report that early in their relationships, the batterers were "attentive and loving" (Browne, 1997:56). During the course of the relationship, the batterer begins to impose restrictions on the woman's daily activities and engages in periodic verbal abuse. These behaviors are precursors to the physically assaultive acts that eventually become a constant feature of the relationship.

#### B. EARLY WARNING SIGNS

The early warning signs for future violence in interpersonal relationships include: (1) intrusion, or an intense interest on the part of the batterer about his partner's whereabouts and daily activities; (2) isolation, or the desire of the batterer to monopolize his partner's time, often restricting her from contact with family and friends; (3) possession, or the "belief that the girlfriend or wife belongs to the man with whom she is involved" (Browne, 1997:58); (4) jealousy, one of the major factors that triggers the assaultive behavior of the perpetrator; (5) prone to anger, in numerous instances when the circumstances do not warrant an aggressive response; and (6) a history of violence including a history of reacting violently to other people as well as family pets and objects in the batterer's environment.

#### C. PATTERNS OF VIOLENCE OVER TIME

In abusive relationships, a distinct pattern of violence emerges and becomes an enduring characteristic of the relationship. This pattern typically includes verbal abuse that precedes physical violence, and is then followed by a period of "remorse and contrition" (Browne, 1987:61).

#### D. THE ROLE OF ALCOHOL AND OTHER DRUGS

Many research studies show a high incidence of alcohol and drug abuse among men who abuse their female partners. While there is an association between substance abuse and interpersonal violence, that is, men who batter are more likely to abuse alcohol or drugs than nonabusive men, it is generally agreed that battering is a socially learned behavior and is not actually caused by substance abuse. Men who abuse their intimate partners often use alcohol as an excuse for their violence. Research has shown, however, that a battering incident coupled with alcohol or drug abuse is often more severe. "Abusive men with alcohol or drug problems attack their wives more frequently, are more apt to inflict serious injuries on their partners, are more likely to be sexually assaultive and are more likely to be violent outside the home than abusers without a history of substance abuse" (Browne, 1997:63).

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## E. LETHAL VIOLENCE

Researchers have discovered distinct patterns in partner homicides committed by men and women (Browne, 1987; Jurik and Winn, 1990; Wilson and Daly, 1993). Men who kill their intimate partners engage in lethal violence in response to actual separation or threat of separation from their wife or girlfriend. They regard separation as the ultimate "rejection and abandonment" (Brenard et al., 1982). In contrast to men, when women do kill, it is often in their own defense. In fact, the majority of partner homicides committed by women happen during an act of aggression against the women or a child (Maguigan, 1991).

Angela Browne in her landmark study of When Battered Women Kill, published in 1987, compared women in abusive relationships with women who were charged with killing their intimate partners, and the following interesting distinctions emerged:

- ◆ "Women who killed their male partners were subjected to much more frequent abuse, suffered more severe injuries, and were sexually assaulted much more frequently, than women in the non-homicide group.
- ◆ Men who were the victims of homicide by their female partners were much more likely to seriously abuse drugs or alcohol than the male partners in the non-homicide group.
- ◆ The percentage of men who threatened to kill their wife or girlfriend was somewhat higher in the homicide group as compared to the "abuse only" group (80% vs. 59%)" (Browne, 1987).

In summary, women who killed their male partners were in situations where they were constantly subjected to serious assaults and sustained severe injuries. Their partners were more likely to be abusing drugs and/or alcohol and threatening to kill them during their violent relationship (Browne, 1987). These women feared that, eventually, they or their children would be killed by their violent partners.

## III. WOMEN'S RESPONSES TO ASSAULTS BY PARTNERS

### A. HUMAN RESPONSES TO TRAUMA

Women who endure violence at the hands of their intimate male partners display similar reactions to survivors of natural disasters, crime or war (Browne, 1987). Their post-trauma responses take the form of "shock, denial, fear, confusion, emotional numbing, a sense of helplessness and a sense of self-blame" (Browne, 1992; Dutton, 1992; Herman, 1992).

## *B. THE CONTINUUM OF THREAT AND DANGER*

In any discussion of domestic violence, the most commonly asked question is "Why do victims of domestic violence stay with their violent mates and endure physical and emotional abuse?" Some of the reasons why it is difficult for battered women to leave their abusers include: (1) fear that the batterer may hurt or kill his victim; "some women who sever their relationship with violent men are followed and harassed for many months or even years and some are killed" (Browne, 1997:67); (2) the victim of domestic violence often lacks the economic resources that are necessary to live independently from the batterer; and (3) pressure to keep the family intact due to constant threats by their abusers; battered women are in great fear of losing custody of their children. Finally, living in hiding from an abusive mate makes it very difficult for a victim of domestic violence to be gainfully employed, raise and educate children, and enjoy other aspects of a normal life (Browne, 1997:67).

## **IV. POLICY IMPLICATIONS**

Research on the nature and extent of violence between intimate partners suggests some directions for policy formulation, program development and research. Intimate violence is a complex social problem which persists despite the development of advocacy and protective services for victims, as well as innovative legal reforms. Domestic violence has reached epidemic proportions, in part due to a scarcity of prevention programs and intervention services for children, adolescents and abusive men (Browne, 1997). Needed interventions include improved assessment tools for early identification of abusive men in mental health and social service settings and expanded services for children and adolescents who have witnessed partner violence (Browne, 1997). In addition, there are critical areas in the study of intimate violence that are in need of empirical assessment. More specifically, further studies are needed to evaluate the impact of current legal policies, for example, mandatory arrest, restraining orders, and other legal sanctions, as well as responses of the social service and advocacy systems, such as shelters and batterer treatment, on victims' safety. Finally, the criminal justice system cannot be expected to act alone to prevent and control domestic violence. All other players in the domestic violence response network -- including health care providers, social workers, and the clergy -- have a critical role to play in providing preventive and intervention services for victims of intimate violence seeking assistance.

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## THE SIX-HOUR SAFE HARBOR RULE FOR QUESTIONING ARRESTED PERSONS IN CUSTODY

Judy Zeprun Kalman  
Assistant Attorney General  
Chief of Litigation, Western Massachusetts Division

*Note: A similar version of this article was published in the March, 1996 edition of the Law Enforcement Newsletter. Subsequently, the Massachusetts Criminal Justice Council Training Manual reproduced a portion of the article, and added an Editor's Note which inaccurately interpreted the protocol suggested by the Office of the Attorney General when statements are obtained from suspects in custody between the time of arrest and arraignment. In order to clarify the protocol, the LEN is publishing the following article.*

**T**he Massachusetts Supreme Judicial Court has created a "safe harbor" rule for statements obtained from suspects in custody between the time of arrest and arraignment. As a practical matter, there is a delay between arrest and arraignment, and during that delay, police officers often obtain a statement from the individual under arrest. While police naturally have an interest in obtaining such a statement, an individual under arrest and in custody has an interest in a speedy arraignment, to be admitted to bail, and either to be appointed counsel if indigent or to be offered the opportunity to retain counsel if not indigent.

Prior to the Court's decision in Commonwealth v. Rosario, 422 Mass. 48 (1996), there existed an unresolved legal issue as to whether the police could deliberately delay arraignment for an unreasonably long period of time in order to obtain a statement from an arrested individual or whether the police had to forego or interrupt the giving of a statement in order to have the arrested individual arraigned as soon as possible. The debate as to whether the police could deliberately delay arraignment was fueled further by the fact that some district courts had imposed certain deadlines upon the police -- if the arrestee was not brought to the courthouse by 1:00 p.m., for example, he had to be brought in the next day. In the trial courts, the legal issue generally was: did the police unreasonably and deliberately delay arraignment in order to obtain a statement from an arrested individual in custody?

In an effort to eliminate the debate about (1) whether the police unreasonably and deliberately delayed arraignment in order to obtain a statement from an arrested individual; (2) whether it matters whether the individual was arrested on a warrant or simply by the police on the basis of probable cause; (3) whether it matters whether the courthouse is open or closed; and (4) whether it matters if the statement was given in

relation to the same charges upon which the individual was arrested or unrelated charges, the Court created a "safe harbor" rule for police questioning. In effect, the Court recognized that the police have an interest in procuring a statement from an arrested individual in custody, even if it means that he will not be arraigned immediately. To protect the right of the individual to be arraigned promptly, however, the Court placed a six-hour limit on the period of time the police may obtain a statement from an individual arrested, in custody, but not yet arraigned.

The new rule is:

**A statement made by an individual who has been arrested either with or without a warrant is admissible (1) if it is made within six hours of the arrest, whether the arrest occurs during the day or night, or (2) if it is not made within six hours of the arrest, the individual has been informed of his right to a reasonably prompt arraignment and has made an informed and voluntary written or recorded waiver of that right, provided that, in either case, the statement is made following a knowing, intelligent, and voluntary waiver of Miranda rights; the statement is voluntary, and the requirement of G.L. c. 276, §33A (notice of right to use the telephone) are afforded the arrested individual. (If the individual is incapacitated due to alcohol or drugs or there is an emergency not precipitated by the police, the six-hour period does not begin to run until after the disability or emergency ends).**

The new rule addresses the first three questions listed above, but not the fourth, namely, whether the safe harbor rule applies where the individual is arrested on a warrant and the statements are given in connection with different, but related charges (e.g., individual is arrested pursuant to warrant issued upon probable cause to believe he committed a breaking and entering and police want to question him about the homicide of the same occupant). Until this variation on Rosario and Ortiz is settled, police officers should abide by the Rosario and Ortiz "safe harbor" rule, irrespective of whether the crime for which the individual was arrested is the same crime about which he is being questioned.

The other issue the Court did not resolve is how to apply the rule where the statement is begun within six hours of the arrest but is not concluded when the six-hour period expires. When does a notice of prompt arraignment have to be presented and when should it be presented in order to take best advantage of the opportunity to procure a statement?

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The following protocol is recommended:

- ◆ Police officers should ensure that the time of the arrest is documented and that upon arrival at the station, the arrested individual is immediately notified of his right to use the telephone and is afforded the right to use the telephone within one hour.
- ◆ The police officers and booking sergeant should ensure that the booking procedure is expedient. The "six-hour clock" will be ticking. Detectives must be available to take a statement immediately -- any delay, including inability to get to the police station, will be attributable to the police and will count against the "six-hour clock." Further, in cases of multiple arrests and multiple bookings, sufficient staff should be on hand to ensure that bookings can occur as soon as possible. It is likely that delays due to "traffic jams" in the booking area will be held attributable to the police and will count against the "six-hour clock."
- ◆ The interview of the arrested individual should take place as quickly as possible after the booking process is complete. The interviewing officer should ensure that the arrested individual has been advised of his Miranda rights and that before the questioning begins, the arrested individual has made a voluntary, intelligent, and knowing waiver of his Miranda rights.
- ◆ The arraignment notice/waiver should be on a separate form (not on the Miranda waiver form) because it is possible that some arrested individuals will waive their Miranda rights but not their arraignment rights and some may waive their arraignment rights but not their Miranda rights.
- ◆ Police officers should always be mindful of the "six-hour clock."
- ◆ If the questioning begins before the "six-hour clock" has expired, as a legal matter, no arraignment warning/waiver need be presented to the arrested person before questioning. At this point, however, it is still too early to tell whether, as a strategic matter, it is more advantageous to present the waiver at the beginning and in conjunction with Miranda warnings/waiver or when the six hours expire and the necessity actually arises.
- ◆ If the questioning has begun within the six-hour period but it is obvious that the questioning will not be completed within the six-hour period, the prompt arraignment notice/waiver should be presented to the arrested individual for his signature if this has not already been done in conjunction with Miranda warnings/waiver (see above). Questioning may continue, however, even if the

individual refuses to sign the prompt arraignment notice/waiver but only for the duration of the initial six hours. If, at any time, however, the arrested person invokes his right to remain silent or his right to have an attorney present, questioning must cease immediately.

- ◆ If the interview does not begin before the six-hour "safe harbor" period expires, the police officer conducting the interview must present the arraignment notice/waiver to the arrested individual for his signature before the questioning begins.
- ◆ Police officers should note the time the interview started and the time it ended. Police officers taking statements should be careful to distinguish between the time the interview began and the time the statement was reduced to writing, if the statement was not typed simultaneously with the giving of the statement. If at all possible, the individual under arrest should sign the statement within the six-hour period. Remember to note the time the arrested individual signed the statement!
- ◆ In all cases, if the arrested person invokes his right to remain silent or right to an attorney, questioning must cease.

If these procedures are followed, any statement given within six hours of the arrest (or later, if within six hours of the arrest the arrested individual is notified and waives his right to a prompt arraignment) will be admissible, irrespective of the time of the arrest or whether the court is open or closed.

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## CIVIL LIABILITY ISSUES IN CONNECTION WITH HIGH SPEED POLICE CHASES

Howard Meshnick  
Assistant Attorney General  
Trial Division, Government Bureau

**V**ehicular police pursuits are often necessary for the enforcement of our criminal and motor vehicle laws. Occasionally, however, these chases result in injuries to passengers or pedestrians. The following is an outline of some of the issues which arise in connection with a lawsuit for injuries incurred in high speed police chases.

### I. WHO IS LIABLE? (PUBLIC EMPLOYER v. INDIVIDUAL OFFICER)

The Massachusetts Tort Claims Act, G.L. c. 258, is the exclusive remedy for recovery for injuries caused by the negligent acts of public employees acting within the scope of their employment. Our courts have determined that generally, the Tort Claims Act applies to three types of claims: 1) negligence; 2) gross negligence; and 3) recklessness.

If a person injured in a high speed police chase brings any of these three claims against an officer, and the officer was acting within the scope of his or her employment at all material times, the officer is immune from suit for those claims. G.L. c. 258, §2 states, in part:

[N]o such public employee, or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent wrongful act or omission while acting within the scope of his employment ...

This principle was reaffirmed in the case of Jackson v. Town of Milton, 41 Mass. App. Ct. 908 (1996), where the Appeals Court held that an officer was personally immune from liability under § 2 of the Tort Claims Act based on an allegation that the officer recklessly initiated a high speed police chase in a densely populated area.

Although an officer is immune from negligence and recklessness claims as discussed above, the officer must provide the public employer (state, municipality, or town) with reasonable cooperation in its defense of the lawsuit. If the officer fails to

provide such cooperation, the officer's employer could bring suit against the officer but only where the failure to provide assistance caused the public employer to lose the lawsuit and incur a judgment. G.L. c. 258, § 2.

Public employers, in contrast to public employees, do not have immunity under the Tort Claims Act for decisions of their officers concerning whether to begin or continue a high speed police chase under the discretionary function exception to the Massachusetts Tort Claims Act. Horta v. Sullivan, 418 Mass. 615 (1994). In the Horta case, the SJC held that such decisions did not involve "policy making or planning" and consequently, the public employer was not entitled to immunity.

On the other hand, public employers have no liability pursuant to § 10(h) of the Tort Claims Act, for:

any claim based upon the failure ... to prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminal suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of a motor vehicle.

While there is little case law interpreting this section of the statute, it may afford the public employer immunity for a claim that an officer negligently discontinued a high speed chase, when subsequently, miles away, the pursued vehicle injured another person. The Supreme Judicial Court has not yet ruled on this issue.

## II. CLAIMS FOR WHICH AN OFFICER CAN BE PERSONALLY LIABLE

Generally, when police officers are sued in their individual capacity for injuries arising from high speed chases, the claims fall into one of the following three categories: 1) intentional torts, such as assault and battery; 2) federal civil rights claims (42 U.S.C § 1983); and 3) state civil rights claims (G.L. c. 12, §§ 11 and 12 (h-i)).

### A. INTENTIONAL TORTS

When a plaintiff brings an intentional tort claim against an officer involved in a high speed chase, the allegations often include that the officer's vehicle physically hit, bumped or rammed the pursued vehicle, resulting in injury to the plaintiff. For these types of allegations, the public employer is immune from suit, G.L. c. 258, §10(c), but the individual officer can be sued for these claims. Ultimately, any judgment is subject to the indemnification protections of G.L. c. 258, §§ 9 & 9A. If the officer sued is a state trooper, and it is clear that at all material times, the trooper was acting within the scope of his or her employment, then the officer is entitled to mandatory indemnification of up

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to \$1,000,000 for intentional torts and civil rights claims provided that the conduct was not found to be willful, wanton, and malicious. G.L. c. 258, § 9A. For all other police officers who are sued for intentional torts or civil rights violations committed within the scope of their employment, they are entitled to \$1,000,000 indemnification at the discretion of their employer so long as their conduct is not found to be grossly negligent, willful, or malicious. G.L. c. 258, § 9.

## *B. CIVIL RIGHTS*

More frequently, a plaintiff injured in a high speed chase files a civil rights action against the pursuing officer under the federal and/or state civil rights statute. For claims brought pursuant to the federal civil rights statute, 42 U.S.C. § 1983, the First Circuit Court of Appeals has applied two different standards for analyzing whether the officer's conduct constituted a constitutional violation. The critical focal point for determining which standard to apply concerns whether the conduct of the officer constituted a "seizure".

A Fourth Amendment "seizure" in connection with a high speed police chase occurs when there is a governmental termination of freedom through means intentionally applied. Brower v. Inyo County, 489 U.S. 593, 597 (1989). Examples of police conduct which may constitute a seizure in a high speed chase include road blocks, use of stop sticks, and ramming.

To constitute a seizure, there must be evidence of physical force or an obstacle, intentionally utilized, to cause an impact to a vehicle for the purpose of bringing the vehicle to a stop. Once an officer's conduct is held to constitute a seizure, courts analyze whether the officer's actions were "objectively reasonable". Graham v. Connor, 490 U.S. 386, 396 (1989). In other words, was the force utilized by the officer to effectuate the stop objectively reasonable in light of the facts and circumstances confronting the officer at the time. Courts will balance the degree of the nature and quality of the Fourth Amendment violation against the governmental interest at stake. Factors used in determining whether force was objectively reasonable include:

1. severity of the crime;
2. whether there was an immediate threat to the safety of officers and others; and
3. whether the suspect was actively resisting arrest or attempting to evade arrest by flight.

The First Circuit recently held that officers who set up a road block to stop a fleeing felon acted in an objectively reasonable manner. The Court noted that the roadblock set up in that case was brightly illuminated, was situated at the end of a

straightaway, with a 50 foot gap around the roadblock to permit vehicular travel, and was visible from 1500 feet away. Seekamp v. Michaud, 109 F.3d 802 (1st Cir. 1997). The Court further noted that the officers had been chasing a fleeing felon who had been driving at speeds of up to 97 miles per hour and had endangered the pursuing officer as well as the public.

### III. NON-SEIZURE PURSUITS - SUBSTANTIVE DUE PROCESS STANDARD

For a federal civil rights claim to proceed against an officer involved in a high speed chase where there was no seizure, a plaintiff must establish that the officer was not only deliberately indifferent to the plaintiff's rights, but also that the officer's conduct "shocked the conscience." This standard is extremely high as evidenced by a First Circuit case in which the Court concluded that an officer's conduct in driving 105 miles per hour on a narrow two-lane highway to apprehend a person suspected of stealing \$17 worth of gasoline, may have been "disturbing, and lacking judgment", but nevertheless, did not "shock the conscience". Evans v. Avery, 100 F.3d 1038 (1st Cir. 1996).

An officer may be entitled to qualified immunity for discretionary acts which result in a § 1983 claim if the constitutional right at issue is not clearly defined enough to enable a reasonable officer to know that such particular conduct would constitute a constitutional violation. Moreover, there is no *respondeat superior* liability under the federal civil rights statute. Accordingly, a supervisor cannot be held liable for the actions of a subordinate unless there is an affirmative link between the supervisor's act or omission which was causally related to the constitutional violation committed by the subordinate.

### IV. FACTORS CONSIDERED BY COURTS IN ANALYZING NEGLIGENCE, RECKLESSNESS, AND CIVIL RIGHTS CLAIMS

Whether a case falls within the Massachusetts Tort Claims Act or proceeds against the officer individually, courts have considered the following factors in determining liability connected with high speed police chases:

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1. the nature of the offense;
2. speed of the chase;
3. length and duration of the chase;
4. the degree of pedestrian and vehicular traffic known to be in the area of the chase;
5. whether the officer communicated with supervisors;
6. whether lights and sirens were activated;
7. whether there was a violation of established policy; and
8. whether alternatives were considered.

Additionally, for analyzing conduct in connection with road blocks, courts have considered the location of the roadblock (straightaway or around a bend), time of day, visibility of the roadblock, whether there was an avenue of egress around the roadblock, and whether headlights were shining directly into the windshield of the pursued vehicle.

## V. STATE CIVIL RIGHTS ACT

Liability under the state civil rights act, G.L. c. 12, §§ 11(h- i), generally parallels liability under the federal civil rights statute with the additional requirement that the person acting under color of law must have interfered with the rights of the plaintiff through the use of "threats, intimidation, or coercion". Notwithstanding the First Circuit's decision in Evans v. Avery, *supra*, the Supreme Judicial Court has declared that under Art. 14 of the Declaration of Rights of the Massachusetts Constitution, a "seizure" occurs when a police officer initiates a vehicular pursuit with the intention of requiring the driver to submit to questioning. Commonwealth v. Stoute, 422 Mass. 782, 788-789 (1996). Consequently, it would appear that for purposes of a claim under the state civil rights act for injuries incurred in a high speed chase involving a show of authority, our courts will analyze the propriety of the officer's conduct based upon an "objectively reasonable" standard.

For further information on this issue, please contact Howard Meshnick, Assistant Attorney General, at 727-2200, ext. 3320.

# HIGH TECHNOLOGY CRIME UNIT

Robert N. Sikellis  
Assistant Attorney General  
Chief, Narcotics & Special Investigations Division  
Criminal Bureau

**N**ot too long ago, high technology crimes, including the theft of trade secrets, software and hardware, as well as the planting of computer viruses, were absent from a prosecutor's priority list. In the 1980s, computer crime ranked sixth in terms of seriousness and frequency among all white collar crime. Now, computer crime is number one.

To the economy and a company, and, in turn consumers, high tech crimes can be devastating. From a dollar and cents perspective, the average bank robbery nets thieves about \$2,500.00. In contrast, the typical theft of computer technology results in an average loss of \$2 million to a company. Since 1992, there has been a 75% increase per year in unauthorized computer intrusions. According to recent statistics from the FBI, yearly industry losses from computer crimes are between \$5 billion and \$10 billion dollars.

In response to these concerns, Attorney General Scott Harshbarger has created a High Technology Crime Unit. One of the first of its kind in the country and the first in the Northeast, the new Unit is a joint effort with the Executive Office of Public Safety, and is located in the Attorney General's Narcotics and Special Investigations Division within the Criminal Bureau. It will be staffed by prosecutors and state and local police and will be headed up by Assistant Attorney General Linda Nutting Murphy.

The Unit will have two primary objectives. First, the Unit, working in conjunction with a task force comprised of trained state and local law enforcement officers, will act as a resource to the law enforcement community. The Unit expects to provide investigative, legal, and technical support on computer-related criminal investigations, including searches and seizures involving computers and computer forensics. Second, this Unit will also work with members of the high tech industry in this Office's efforts to identify, investigate and prosecute those individuals who are committing high tech crimes. The Unit will draw from the private and public sector to bring together the best technical, investigative and prosecutorial minds in a partnership to protect.

Since its inception in April, the Unit has already been involved in a number of significant undertakings. For example, a recent investigation resulted in the execution of a search warrant and the seizure of more than 1,000 illegal cable converting devices.

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Records seized as a result of the search establish that the suspect sold over 30,000 of these devices last year. Conservative estimates place the loss to the cable industry from these sales at over 16 million dollars.

In addition, the Unit has also been called upon to provide forensic and technical assistance in a number of investigations by local police departments. These have ranged from a bomb threat sent via the Internet to providing forensic assistance in the analysis of computerized records seized following a prostitution and child sexual assault investigation.

If you need assistance in the area of computer crimes, or if you are aware of computer crimes occurring in your jurisdiction and would like to use the services available in the new High Tech Crime Unit of the Office of the Attorney General, please contact Assistant Attorney General Linda Nutting Murphy, at 727-2200, ext. 2524.

## RECENT CASES

### I. SEARCH AND SEIZURE

#### A. *Warrantless Searches*

Requiring a suspect to display tread of shoes does not constitute a search under the Fourth Amendment. Commonwealth v. Billings, 42 Mass. App. Ct. 261 (1997)

A detective asked a suspect to lift up his foot so that the tread of his sneaker could be examined. At trial, and over the defendant's objection, the detective was permitted to testify that the tread pattern matched a bruise pattern on the victim's shoulder.

The Appeals Court held that there is no reasonable expectation of privacy in shoe treads, and hence, requiring an individual to display the soles of shoes does not constitute a search within the meaning of the Fourth Amendment. The Appeals Court compared the soles of a person's shoes to one's voice, face and handwriting, noting that all of these characteristics are constantly exposed to public view. For this reason, even if the suspect believed that the treads on his sneakers were private, society would not consider this expectation of privacy as reasonable.

Suppression order reversed where motion judge participated in pat frisk demonstration at hearing. Commonwealth v. Dedominicis, 42 Mass. App. Ct. 76 (1997).

A police officer received a radio transmission that three robbery suspects, at least one of them armed, were heading toward a particular area. When the officer arrived at the area, he noticed a man, subsequently identified as the defendant, walking in one direction, and another man nearby, who was sweating profusely and appearing nervous. The police officer saw a bulge in the defendant's pants. While patting him down, the officer felt an object he characterized as "hard". The officer inserted his thumb into the defendant's pocket and saw that the object was a wad of bills. The officer called for backup, and asked that a witness to the robbery be brought to the scene. The witness stated that the defendant had the same build as the robber and that the money taken was mostly ones and fives. The police officer arrested the defendant, took the wad of bills from the defendant and found that it contained about 200 five dollar bills.

At the suppression hearing, the motion judge, at defense counsel's request, felt the wad of bills in the defendant's pocket. The judge concluded that the bulge was not "hard", and that a reasonable person would not have believed that the wad was a weapon. As a result, the court granted

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the defendant's motion to suppress. The Commonwealth appealed, and the Appeals Court reversed the suppression order, concluding that the officer's search for a weapon was reasonable based on the dangerous circumstance, the officer's experience, and his need to make a swift assessment of the potential danger and his need to protect himself. Additionally, the Appeals Court stated that the use of the factfinder in a demonstration of the evidence, particularly where the issue involved a subjective standard, was improper.

Appeals Court holds high crime area search unlawful. Commonwealth v. Kennedy, 42 Mass. App. Ct. 668 (1997).

A police officer had partially witnessed an apparent "exchange" between the defendant and an individual who was known to have a prior drug arrest. The exchange occurred in an area known to be "high crime and drug area". On the basis of the exchange, the police stopped the defendant's car and searched him, finding cocaine. The Appeals Court reversed the conviction, holding that the search was not founded on probable cause, but rather only on "suspicion of criminal involvement".

Suppression order upheld where officer's pat frisk conducted unlawfully. Commonwealth v. Davis, 41 Mass. App. Ct. 793 (1996)

A state trooper stopped the defendant for tailgating the trooper's cruiser. When the trooper put on her blue light, the defendant immediately pulled over, and denied knowing that she was tailgating a cruiser. After verifying that the defendant's license and registration were in order, the trooper let the defendant go with a verbal warning. Immediately thereafter, the trooper pulled the defendant over again after clocking her going 85 in a 55 mile per hour zone. Upon noticing that the defendant's eyes were glassy and bloodshot, the trooper asked the defendant to perform four field sobriety tests, which the defendant completed successfully. The trooper then asked if the defendant had any sharp objects on her. When the defendant said no, the trooper decided to pat frisk her because she was in fear for her own safety. As the pat frisk began, the defendant removed a plastic bag from her pocket and said "[t]hat's my pot." The trooper arrested the defendant, performed an inventory search, and discovered a gun and ammunition.

The defendant moved to suppress the evidence, and the district court judge granted the motion, concluding that although the defendant's conduct in operating the car was sufficient to cause concern, there was no indication of the presence of a weapon. Accordingly, the trooper's

decision to frisk was based upon a hunch rather than reasonable suspicion. The Appeals Court agreed, further noting that during both stops, the defendant cooperated fully, had a valid license and registration, and did not exhibit any signs or suggestions that she was armed and dangerous. The Court emphasized that "mere nervousness is an insufficient basis on which to establish probable cause to search an individual."

#### *B. Searches with a warrant*

SJC upholds reversal of defendant's conviction where anticipatory warrant insufficient. Commonwealth v. Gauthier, 425 Mass. 37 (1997).

Based on surveillance and controlled buys with a marijuana dealer, police suspected that a certain individual was supplying the drugs. As a result, the police applied for an anticipatory warrant to be executed upon a large order being placed with the dealer, who would then go to the defendant's house. Upon exiting the defendant's house, the dealer was to be searched and if marijuana was found on him, the warrant would be activated. The plan did not work as expected, however, because the dealer left the defendant's house through a back door and was not stopped until he had driven away from the house. Marijuana was found in the car. The defendant's motion to suppress was denied, but the Appeals Court reversed, holding that the

anticipatory warrant was insufficient because the triggering event was not noted on the face of the warrant, nor was the affidavit setting out the triggering event attached to the warrant.

The Supreme Judicial Court granted the Commonwealth's application for further appellate review, and affirmed the decision of the Appeals Court, but for the reason that the triggering event set out in the affidavit had not occurred. The SJC reiterated that anticipatory warrants are not per se unconstitutional, and declared that neither the federal nor state constitution requires that the triggering event on which a warrant might be activated be set out on the face of the warrant or in an attached affidavit.

Civilian participation in execution of search warrant upheld but SJC issues cautionary instructions for future cases. Commonwealth v. Sbordone, 424 Mass. 802 (1996).

The Supreme Judicial Court determined that participation of a civilian investigator in the execution of a search warrant is not a per se violation of Article 14 of the state constitution or G.L. c. 276, § 2. In this case, the affiant to the search warrant application was an investigator with the Insurance Fraud Bureau who specialized in fraudulent bodily injury claims. The warrant application specifically requested that the investigator be permitted to be present during and assist in the search

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of the defendant chiropractor's office. The Superior Court judge who issued the warrant orally authorized the presence and assistance of the investigator.

At some points during the search, the investigator was unaccompanied by any of the state troopers who were executing the warrant. The SJC concluded that the troopers should have limited the investigator's role to assisting the officers with technical questions. Except in limited circumstances, for example, a search through computer files, the police must appropriately supervise and restrict a civilian's role to assistance rather than participation. Because the evidence here would have inevitably been discovered by the troopers without the help of the investigator, and where the police acted in good faith, the SJC held that suppression of the evidence was not required.

Defendant's conviction reversed where search warrant affidavit failed to establish justification to search "any person present". Commonwealth v. Souza, 42 Mass. App. Ct. 186 (1997).

The police obtained a search warrant for a particular apartment, authorizing the search of "any person present". When the defendant, who was neither the occupant of the apartment nor the named target on the warrant, entered the apartment, he was searched pursuant to the warrant. He appealed his conviction for unlawful

possession of a firearm and marijuana on that ground, as well as the court's pre-trial allowance of a motion to amend the complaint from carrying a firearm to possession of a firearm.

The Appeals Court reversed the conviction, holding that the affidavit in support of the warrant failed to establish justification for the search of "any person present". In so doing, the Appeals Court cautioned that such broad warrants would be upheld only in the limited circumstances where the police establish the character of the premises, the nature of the criminal activity, and the behavior of persons coming and going during the times of day that the warrant is to be executed. Police must aver whether persons unconnected to the criminal activity had been observed at the premises. In its decision, the Appeals Court held that here, the police had no reason to believe that the defendant was armed, therefore rejecting the argument that the search could be justified as a protective pat frisk. Finally, the Appeals Court determined that the amendment to the complaint changing the charge from carrying a firearm to unlawful possession was one of substance and not one of form, and thus, the amendment should not have been allowed over the defendant's objection.

Affidavit in support of search warrant provided probable cause for search despite discrepancies.  
Commonwealth v. Padilla, 42 Mass. App. Ct. 67 (1997).

Police officers obtained a search warrant for a specific apartment based on information from a "citizen" and a controlled buy from an informant. The reliability of this informant was shown by various tips he had previously given to police which had resulted in arrests and seizure of contraband. When the police executed the warrant, the defendant was packaging heroin in a front bedroom. After receiving Miranda warnings, the defendant led the police to a back bedroom where 89 grams of heroin were hidden in the ceiling.

The Appeals Court found that the affidavit in support of the warrant provided probable cause for the search. The defendant was not entitled to a Franks hearing or an Amaral hearing because the affidavit did not cast reasonable doubt on the existence of the two informants and the discrepancies in the affidavit were due to carelessness, which did not constitute the intentional or reckless making of false statements.

The Appeals Court also found that the defendant had sufficient command of the English language to understand his rights in light of the fact that he knew the officer involved and had spoken English with him on previous occasions. Although the defendant pointed at the opposite corner of the ceiling from where the

drugs were found, he was observed sealing bags of heroin and the jury was entitled to conclude that he had constructive possession of the drugs in the ceiling.

## II. CONFESSIONS/ ADMISSIONS/HEARSAY

Suppression order vacated in first degree murder case where Miranda warnings properly issued.  
Commonwealth v. Torres, 424 Mass. 792 (1997).

Prior to his trial on charges of murder in the first degree and illegal possession of a firearm, the defendant moved to suppress his statements to the police, claiming that the police had violated his right to remain silent.

Following an evidentiary hearing, the motion judge allowed the motion to suppress, finding that although the previous evening, the police had properly administered Miranda warnings and stopped questioning the defendant immediately upon his invoking his right to remain silent, the next morning, the police engaged the defendant in a general conversation without readministering Miranda warnings. The motion judge concluded that this conversation constituted the "functional equivalent" of interrogation. Shortly thereafter, the police informed the defendant that they wanted to question him about the murder, readvised him of his Miranda rights, and obtained another waiver. The defendant then provided a lengthy written statement detailing his involvement in the murder. Later that

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day, the police readministered Miranda warnings, obtained another waiver after which the defendant provided a second written statement. The motion judge suppressed that statement as well, concluding that it referred to and supplemented the first post-Miranda statement. The Commonwealth appealed.

The SJC held that the trial court's findings were insufficient to support its conclusion that the morning conversation between the defendant and police was the functional equivalent of interrogation. The Court reasoned that there was no indication in the record that the dialogue between the defendant and the police was initiated by police in an attempt to obtain an incriminating statement. Moreover, the Court concluded that the trial court erroneously focused its analysis upon the subjective intent of the police, rather than upon an objective assessment of whether a reasonable person in the defendant's circumstances would have perceived the police conduct as interrogation. The Court further found that even if the defendant had been improperly interrogated, the motion judge did not address the basis for excluding statements made by the defendant after executing a valid Miranda waiver, particularly where the judge found that the statements were made knowingly, voluntarily and without coercion or duress. Accordingly, the Court remanded the case to the Superior Court for further proceedings on these issues.

First degree murder conviction upheld where resumption of questioning after Miranda warnings reissued held lawful. Commonwealth v. Rivera, 424 Mass. 266 (1997).

In appealing his convictions of first degree murder and unlawful carrying of a firearm, the defendant claimed that the motion judge improperly denied his motion to suppress a statement made during booking and after allegedly invoking his Miranda rights. The booking officer initially testified that he asked the defendant whether he understood the Miranda warnings and that the defendant waived them. The officer later revised his testimony and said that he never asked the defendant about waiver, and that the defendant did not ask for an attorney, was not questioned about the crimes, and made no statements about the crimes during the booking process. The defendant made the incriminating statement about three and one-half hours later, when other police officers questioned him, after providing a fresh set of Miranda warnings and after the defendant expressly waived his rights.

The SJC affirmed the motion judge's findings both that the booking officer's explanation of the discrepancy in his testimony was "entirely credible" and that, even if the defendant had invoked his rights during the booking process, "the passage of time and the fresh set of Miranda warnings would be sufficient to create a valid waiver." The SJC reiterated the rule that no *per se*

rule exists to prevent a resumption of questioning after a defendant invokes his Miranda rights. The issue is whether the right to be free from interrogation, once invoked, is "scrupulously honored".

Cocaine trafficking conviction reversed where informant's hearsay statements admitted into evidence after informant invoked Fifth Amendment right to not incriminate himself.  
Commonwealth v. Urena, 42 Mass. App. Ct. 20 (1997).

The defendant was convicted of trafficking in more than 200 grams of cocaine after a jury trial. The Appeals Court reversed the conviction as a result of the judge's admission into evidence of the informant's hearsay statement after the informant had invoked the Fifth Amendment right to not incriminate himself. The Appeals Court determined that the admission of the statements violated the defendant's Sixth Amendment right of confrontation. Specifically, the Commonwealth elicited testimony from a police officer on rebuttal to disprove the defendant's argument that he was entrapped. The testimony included the informant's out-of-court statement to the officer that the defendant was his drug source.

### III. WAIVER

A signed written waiver is required for a defendant to validly waive the right to a trial by jury.  
Commonwealth v. Wheeler, 42 Mass. App. Ct. 993 (1997).

Despite strong evidence that the defendant knowingly and voluntarily waived his right to a jury trial as a result of an oral colloquy, the Appeals Court ruled that the absence of a written waiver as required by law under G.L. c. 263, § 6, signed by the defendant and filed with the trial court, violated the bright line rule requiring both a colloquy and a written waiver of the right to a trial by jury. The defendant's conviction of assault and battery by means of a dangerous weapon was reversed.

In a secondary evidentiary matter, the Appeals Court ruled that the exclusion of a 911 tape was proper where the authenticity of the tape was neither stipulated to nor proved. The victim testified to knowing that the defendant had called 911 but had no knowledge of the substance of the call. Therefore, exclusion of the tape was proper where the tape could not be connected to the victim's testimony and the defendant did not take the stand.

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## IV. CRIMINAL STATUTES INTERPRETED

SJC declares the vagrancy statute unconstitutional. Benefit v. City of Cambridge, et al., 424 Mass. 918 (1997).

Craig Benefit was arrested three times for begging in Harvard Square and charged with violating the vagrancy statute, G.L. c. 272, § 66. Benefit admitted to sufficient facts, and the charges were continued without a finding and ultimately dismissed. Subsequently, Benefit filed an action to have the vagrancy statute declared an unconstitutional infringement upon his First Amendment rights.

The Supreme Judicial Court held that begging cannot be distinguished from charitable solicitation, which is protected by the First Amendment. In so doing, the Court reasoned that the vagrancy statute punishes the content of the message conveyed by the individual beggar as opposed to the conduct; that the statute impermissibly favors the view that poor people should be helped by organized charities rather than by individual begging for themselves; and that banning begging in public ways does not support the Commonwealth's interest in preventing crimes and providing safe streets. Accordingly, the Court affirmed the Superior Court's declaration that the vagrancy statute violated the First Amendment.

Arrest by deputy sheriff where no breach of peace occurred held unlawful. Commonwealth v. Baez, 42 Mass. App. Ct. 565 (1997).

A deputy sheriff arrested a driver for driving with a defective headlight. The license check showed that the defendant's license had been revoked. As a result, the deputy sheriff arrested the driver. The Appeals Court held that the arrest was unlawful because although a deputy sheriff is statutorily authorized to stop a driver for a civil motor vehicle infraction, there is no statutory or common law authority to arrest an individual without a warrant for a misdemeanor not amounting to a breach of the peace. Although acknowledging that driving with a revoked license is serious, the Appeals Court noted that such an offense did not necessarily threaten to disturb the peace. The Appeals Court further noted that a sheriff was "empowered" to pursue criminal charges by applying for a criminal complaint (and indicating as such on a citation) without having to arrest the offender.

Solicitation of a felony, including murder, is a misdemeanor. Commonwealth v. Barsell, 424 Mass. 737 (1997).

The Supreme Judicial Court upheld a Superior Court decision that solicitation of a murder is a common law misdemeanor. The Court explained that although conspiracy and attempt, the other two inchoate crimes, are both codified as felonies, solicitation to

commit a felony remains a misdemeanor. Accordingly, the SJC suggested that the Legislature could enact a statute creating the felony of solicitation to commit a felony. (There is currently a bill in the Legislature to make the crime of solicitation of a felony a felony.)

SJC reverses decision of Appeals Court and holds that concrete pavement does, in certain circumstances, constitute a dangerous weapon, despite its stationary character. Commonwealth v. Sexton, 425 Mass. 146 (1997).

The SJC, after granting further appellate review of the Appeals Court's decision that concrete pavement did not constitute a dangerous weapon, concluded that concrete pavement can constitute a dangerous weapon. The Appeals Court had reversed a conviction of assault and battery by means of a dangerous weapon because the "dangerous weapon" was concrete pavement against which the victim's head had been bashed. The SJC disagreed with the Appeals Court's reasoning and held that "one who intentionally uses concrete pavement as a means of inflicting serious harm can be found guilty of assault and battery by means of a dangerous weapon".

## V. OPERATING UNDER THE INFLUENCE

Field sobriety tests are not testimonial, and Miranda warnings are not required for temporarily detaining a motorist. VanHouton v. Commonwealth, 424 Mass. 327 (1997).

The defendant was charged with a fifth offense for operating a motor vehicle while under the influence. The defendant moved to dismiss the charges on double jeopardy grounds based on the administrative seizure of his driver's license when he refused the breathalyzer test. The SJC rejected the double jeopardy claim, holding that an administrative seizure did not constitute punishment.

The defendant also moved to suppress evidence of his performance on the heel-to-toe, one-legged standing, and alphabet recitation field sobriety tests. The Court concluded that under Fifth Amendment analysis, a motorist who is temporarily detained after being stopped on suspicion of operating while under the influence is not in custody, and hence, a police officer is not required to furnish Miranda warnings before administering field sobriety tests. The Court also held that for the purposes of Article 12 of the state constitution, the field sobriety tests administered were not testimonial and were not protected by the privilege against self-incrimination.

# Law Enforcement Newsletter

## VI. EVIDENTIARY ISSUES

Evidence insufficient to prove defendant's intent to participate in tenant's marijuana growing operation. Commonwealth v. Camerano, 42 Mass. App. Ct. 363 (1997).

A defendant's conviction for conspiracy to possess marijuana with intent to distribute was set aside and the Appeals Court ordered that a finding of not guilty be entered for the defendant where he successfully argued that the evidence did not establish his participation in an agreement to accomplish a criminal purpose.

Sixty feet behind the defendant's residence, the police, through helicopter surveillance, observed a roofless structure, with plywood sides, no windows and a single padlock on the door. During a search of the structure, the police found 107 marijuana plants. Behind the structure was a house trailer rented by the defendant to a tenant. Buried behind the trailer, police found five pounds of dried and packaged marijuana; inside the trailer, police saw a food processor with marijuana residue, two scales, a box of gallon-sized zip-lock bags, and a small amount of cut and dried marijuana. Behind that trailer, the police observed another utility trailer which belonged to a friend of the defendant, in which there was a suitcase stuffed with eight pounds of marijuana.

No drugs, drug paraphernalia, key to a padlock, nor anything else connected to drug distribution was located in the defendant's residence.

The Appeals Court reversed the defendant's conviction, noting that there was no evidence to suggest that the defendant knew when he rented a portion of his property to his tenant that the tenant was going to raise marijuana. "Intent is a requisite mental state for conspiracy, not mere knowledge or acquiescence." The defendant's motion for a required finding of not guilty should have been granted.

Judge properly denied defendant's motion for a required finding on armed robbery charge where possession of a gun did not obviate police officer's fear or apprehension when being lashed at with a screwdriver. Commonwealth v. Grassa, 42 Mass. App. Ct. 204 (1997).

A police officer was on detail in a supermarket when a car alarm went off. The suspects fled and were observed entering a parking lot whereupon the defendant broke into a Chevrolet Blazer, but left the side door open. The officer approached the open door and ordered the defendant out of the car. Using profanity, the defendant threatened that he would kill the officer if he refused to leave. When the officer drew his revolver, the defendant lashed out at him with a screwdriver. The car then started and went into reverse with the door still open, requiring the officer to jump back to avoid being hit.

Among other charges, the defendant was tried and convicted of armed robbery and assault on the officer with a dangerous weapon (the Blazer). On appeal, the defendant claimed that because the police officer had a gun, he could not have reasonably been fearful or apprehensive of the screwdriver. The court rejected that contention, stating that the weapon could be "discounted because of an officer's natural reluctance to fire it and his schooled forbearance to do so and have later to meet a claim that he used excessive force."

The court further stated that where the police officer had a duty to protect life and property and preserve the peace, he had a "protective concern" for the Chevrolet Blazer, which is sufficient for an armed robbery indictment.

Conviction reversed where defendant's photo array identification tainted by prior view of a "Wanted Poster". Commonwealth v. Day, 42 Mass. App. Ct. 242 (1997).

The defendant was charged with shooting a victim outside of a bar. Inside the police station, a "Wanted Poster" depicting a photograph of the defendant and stating that he was "wanted" for the shooting was displayed. The poster noted that the source of the defendant's photograph was a correctional institution. The poster further noted that the defendant was

"armed and dangerous" and a member of the "Devil's Disciples" gang. At the station, the victim first looked at the "Wanted Poster" and then identified the defendant from a photographic array.

At trial, the primary issue was the defendant's identification. His attorney introduced into evidence the poster to demonstrate that the photo identification had been tainted by the victim's prior view of the "Wanted Poster". The Appeals Court reversed the defendant's conviction, holding that he was materially prejudiced by the introduction of the poster because it indicated that he had a prior criminal record and was "wanted" for the shooting.

## VII. CIVIL LIABILITY

Landlord not liable for murder of a police officer despite knowledge of illegal drug activity in apartment. Griffiths v. Campbell, 425 Mass. 31 (1997).

The widow of Boston Police Detective Sherman Griffiths sued the landlord of the apartment building in which her husband was murdered while conducting a drug raid on the grounds that the landlord was negligent in 1) failing to notify the police of drug activity in the building, and 2) permitting the tenant to have a heavily secured door installed. The jury found the landlord liable, but the Supreme Judicial Court reversed and entered judgment in the landlord's favor.

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The Court held that the murder of a police officer during a drug raid is not a reasonably foreseeable consequence of failing to notify police of suspicions of illegal drug activity, even if the failure is negligent. Liability of a landlord would ensue only where there was a showing that the landlord knew or should have known that previous attacks had occurred and might recur if measures to make the premises safer were not taken. The Court further stated that because landlords have a duty to provide a safe residence for their tenants, landlords are not required to risk liability by ordering a tenant to remove a secure door and install a less secure door, particularly when the apartment has been broken into before.

## CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200; TTY-(617) 727-4765. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

This publication is available in alternate formats for persons with disabilities. If you would like your copy of Attorney General Scott Harshbarger's Law Enforcement Newsletter in large print, audio-tape or another format, please contact us.

**TO CONTACT ONE OF THE FOLLOWING INDIVIDUALS, PLEASE CALL  
617-727-2200 AND ASK FOR THE DESIGNATED EXTENSION.**

	<u>Ext.</u>
Scott Harshbarger, Attorney General . . . . .	2042
Thomas H. Green, First Assistant . . . . .	2057

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# *Focus on Crime Victims*

*A Newsletter from Attorney General Scott Harshbarger*



Dear Colleague:

Welcome to the first edition of "Focus on Crime Victims" -- a newsletter designed specifically for criminal justice professionals and victim service providers to highlight important legal developments, outstanding practices, and developing trends in the ever-advancing field of victim rights and victim services. Fittingly, publication of this inaugural edition coincides with our annual commemoration of Victim Rights Week from April 13 - 19, 1997. I specifically invite each of you to attend the Victim Rights Conference, to be held on Thursday, April 17, 1997, at the State House. Details are enclosed.

As Attorney General, and as Chairman of the Massachusetts Victim and Witness Assistance Board, one of my top priorities has been to further advance the rights, dignity, services and protection afforded to crime victims in our criminal justice system. In the past few years we have seen historic progress toward these goals -- passage of the 1995 Victim Bill of Rights, developments in domestic violence prevention and prosecution, victim compensation reform, expanded federal funding for victim services and violence prevention, and the development of specialized victim service units in prosecutors' offices are but some of the many, many advances that, together, have fundamentally altered the role and status of crime victims. No longer seen simply as potential witnesses in a system that has little to do with them, crime victims have at last become active and informed participants in the full range of proceedings by which we prosecute, punish and release those who have brought destruction and misery to their lives.

Despite these advances, much remains to be done. As criminal justice professionals -- whether we are prosecutors, judges, police officers, probation officers, clerk-magistrates, court personnel or victim/witness advocates -- we share in the grave responsibility to ensure full protection of the rights of every crime victim. With our colleagues in the victim service community -- whether they work in shelters, child advocacy centers, MADD offices, rape crisis centers or elsewhere -- we share in the goal of providing victims a web of services and support in the most difficult time in their lives.

This issue of "Focus on Crime Victims" covers a number of important issues designed to advance these purposes. It contains updates from the Massachusetts Office for Victim Assistance, and articles on specialized victim services units in the Northwestern District and Suffolk County District Attorney's offices. It includes a special focus section on the right to confer with the prosecutor, a right established by the Victim Rights Law. Other features address the disturbing trend of retaliatory "SLAPP" suits against crime victims, and what can be done about them; protocols for responding to discovery requests for rape counseling records, tips for interacting with elder victims, and summaries of important pending legislation.

My hope is that this newsletter will serve as forum for the many, many outstanding citizens, crime victims and professionals who, day in and day out, work to honor the needs and rights of those whose lives have been devastated by crime. Please let me know what you think of "Focus on Crime Victims", and what you would like to see in future editions.

I hope to see you on April 17th.

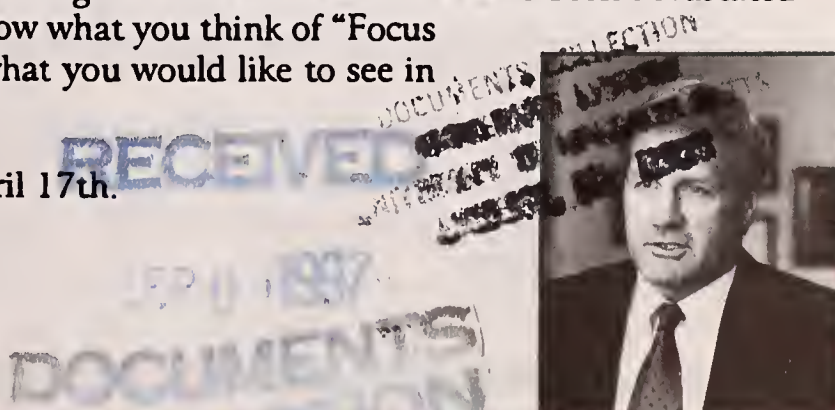
Scott Harshbarger

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# GREETINGS FROM THE MASSACHUSETTS OFFICE FOR VICTIM ASSISTANCE

*Heidi Urich, Executive Director  
Massachusetts Office for Victim Assistance*

**W**ith Victim Rights Week rapidly approaching, we are busily preparing for the annual statewide conference and the many local events that will mark the week of April 13 - 19, 1997. Last year over 1,000 people registered for the Massachusetts Victim Rights Conference, which will be held this year on Thursday, April 17th. We will take over the State House on that date - as we have for the last 5 years! If you haven't received registration materials, call us at (617) 727-5200. We are also publishing a statewide Calendar of Events for Victim Rights Week to highlight local observances and promote public awareness.

The legislature's season of public hearings on proposed laws has just begun. MOVA and its governing body, the Victim and Witness Assistance Board chaired by Attorney General Scott Harshbarger, are sponsoring four major bills to help victims which will be the subject of legislative hearings in the coming weeks. The bills include a proposal for a comprehensive system for courts to order and collect victim restitution, a law to prevent offenders from unfairly profiting from their crimes, a special automotive license plate to show public support and generate funds for grassroots victim services and violence prevention efforts, and an amendment to the state constitution to recognize victim rights in the criminal justice system. More information on these initiatives is presented in a later article. If you are interested in working with MOVA on legislation to strengthen victims rights, please give us a call.

Our legislative efforts in previous years have given Massachusetts a strong Victim Bill of Rights and an offender-derived funding stream to pay for victim assistance services in the courts. Since the recognition of victim rights is a relatively new movement that continues to evolve, we are always seeking ways that the Commonwealth can be more responsive to victim needs. The 1995 expansion of the state's Victim Bill of Rights, sponsored by MOVA, drew on the experiences of victims, advocates and prosecutors from across the state to develop more avenues for victim participation in the criminal justice process.

In addition to advocating for victim rights, MOVA works to expand services for victims. Federal funding has allowed us to increase our network of specialized services to victims and their family members. Sixty community-based programs are now offering services such as: bereavement support to family members of homicide victims; counseling and support groups for child and adult victims of rape and sexual assault; and support services for battered women and their children. These programs receive funding from the federal Victims of Crime Act (VOCA) grant program administered by MOVA through a competitive application process. A pilot program of court-based advocates, known as SAFEPLAN, is helping victims of domestic violence in the western part of the state obtain civil restraining orders and individualized safety plans. MOVA also has a victim advocate on staff to help callers who are seeking information on victim rights or referrals to victim services in their communities. We also offer training and technical assistance to victim services and other interested groups.

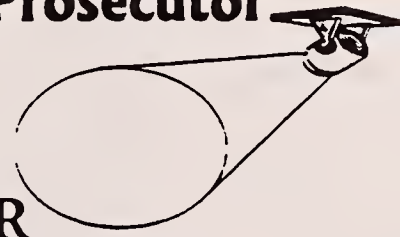
MOVA's mission is to serve as an advocate and resource for the advancement of victim rights and services in the Commonwealth. We applaud Scott Harshbarger for launching this forum to promote information sharing and to highlight issues of importance to the victim rights community.

**BULLETIN:** The Massachusetts Office for Victim Assistance and the Victim and Witness Assistance Board have published "In the Aftermath of Crime: A Guide to Victim Rights and Services in Massachusetts." Copies are available from MOVA. Call: (617) 727-5200.



# Focus on the Victim's Right to Confer with the Prosecutor

## A PROSECUTOR'S PERSPECTIVE ON THE VICTIM'S RIGHT TO CONFER



*Carol Starkey, Assistant Attorney General  
Chief, Economic Crimes Division  
Criminal Bureau*

The Commonwealth has a tradition of being on the forefront of the victim rights movement. With the passage of the Victim Rights Law of 1995, the legislature maintained that tradition by ensuring that players within the Massachusetts criminal justice system take further notice. A victim's right to receive information about a criminal case, and to participate fully in the criminal process, are no longer left to the practices of an individual prosecutor or judge. Now, they are clearly mandated by the Victim Rights Law. The goal of the enhanced law is distinctly clear: to ensure victims a more meaningful role in the criminal justice system.

What does this new law mean for prosecutors in their daily practice of handling criminal cases? First, it means that any person acting on behalf of the Commonwealth must understand and comply with the new Victim Rights Law. Second, it means that prosecutors will bear increased responsibility for ensuring that the victims are not only seen, but are also heard, in the cases they prosecute.

For prosecutors, one of the most significant provisions in the new law is the mandate for a government lawyer to confer with victims of crime before key stages in the criminal proceedings. The new and enhanced law is quite specific about how and when a prosecutor must confer with crime victims and their family members before, during and after a criminal trial or disposition. G.L. c. 258B, § 3(g) establishes the right:

... for victims, to confer with the prosecutor before the commencement of the trial, before any hearing on motions by the defense to obtain psychiatric or other confidential records, and before the filing of a nolle prosequi or other act by the commonwealth terminating the prosecution or before the submission of the commonwealth's proposed sentence recommendation to the court. The prosecutor shall inform the court of the victim's position, if known, regarding the prosecutor's sentence recommendation...

While we might like to think that the right to confer spelled out by the statute simply reflects good, professional, existing prosecutorial practices, we know this isn't always the case. Clearly, this right to "confer" extends well beyond notifying the victim of the next court date. A "conference," according to Black's Law Dictionary, is "a meeting of several persons for deliberation, for interchange of opinion, and for the removal of differences or disputes." In the context of criminal prosecution, the conference between the prosecutor and the victim should provide the victim a *meaningful* opportunity for input *prior* to the Commonwealth formulating its final position with regard to the issue or case at hand. At each of the stages mentioned in the statute, the prosecutor should explain to the victim the various options available, answer questions, solicit and consider the victim's views, and explain

the decision reached or action taken.

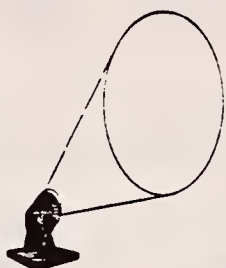
Of course, the right to confer does not alter the prosecutor's historic role and ethical responsibility to act in the public interest, to be fair and equitable, and to see that justice is done in keeping with governing ethical obligations and standards of professional responsibility. In any given case, the public interest may require more, less, or simply something different than the victim understandably desires. A whole host of factors go into the prosecutor's decisions, including governing statutes and case law, the strength of the evidence and the likelihood of conviction, the defendant's prior history, and overriding issues of public policy and public safety. The Victim Rights Law does not change this. In fact, it is quite clear in providing that "the right of the victim to confer with the prosecution does not include the authority to direct the prosecution of the case." G.L. c. 258B, § 3(g). While not giving the victim control or veto-power, the Victim Rights Law nevertheless clearly enhances the victim's role vis-a-vis the prosecutor. Through the right to confer, it ensures that the victim's interests are solicited, heard and included in all key decisions in the prosecution of the case, and that the court is informed of the victim's position on sentencing.

Like the prosecutor, the probation department also must confer with victims prior to the filing of the full presentence report on a de-

fendant. G.L. c. 258B, § 3(n). Probation officers are now required to report the victim's input to the court during this stage of a criminal case. Therefore, the victim's input is deemed to be part of the presentence report. If a victim declines to confer with a probation officer during the course of preparation of the presentencing report, the probation officer is obligated to note the victim's declination within the report.

Giving victims of crime the opportunity to confer and participate in all stages of a criminal case ensures that the victim's views and needs are considered more fully by the very members of the criminal justice system whose decisions may have the greatest impact on their lives. It also helps to confirm that the prosecutor has all of the information regarding the true nature and consequences of the crime prior to formulating a theory of the case, or a sentencing recommendation, on behalf of the Commonwealth. Finally, enhanced communication with the victim enables a better understanding of what punishment the offender may receive and why, thereby minimizing the potential for the victim to feel disenfranchised from the criminal justice system, and disillusioned with the law.

One need only turn on the morning news to capture the flavor of America's cynicism towards the criminal justice system. Whether the focus is on the victim of a crime or the target of a criminal investigation, there seems far more criticism than praise about how government does its business. As a member of the system, whether a prosecutor, probation officer, police officer, judge, or one of their many assistants, each one of us must overcome that cynicism and undertake the challenge of responding to the needs of those most seriously affected by our work: the victims of crime.



## SJC HOLDS THAT VICTIM'S DESIRES ARE A RELEVANT FACTOR IN EXERCISE OF PROSECUTORIAL DISCRETION

*Judith E. Beals, Assistant Attorney General  
Chief, Victim Compensation and Assistance Division*

Relying on several provisions of the 1995 Victim Rights Law, the SJC recently gave explicit recognition to a prosecutor's right to give deference to the views of the victim's family in deciding whether to accept a defendant's offer to plead to reduced charges. The case, Commonwealth v. Latimore, 423 Mass. 129 (1996), provides important support for prosecutors in ensuring that victims' concerns are properly factored into all key decisions involving the disposition of a criminal case.

In 1976, Willie Latimore was convicted of first degree murder in the stabbing death of Philip Poirer at the Canadian Club bar in Taunton. His conviction was affirmed on appeal. Thirteen years later, following the Supreme Judicial Court's decision in Commonwealth v. Ferreira, 373 Mass 116 (1977), the trial court granted Latimore's request for a new trial because he had been convicted on the basis of a constitutionally erroneous "reasonable doubt" standard.

While the second trial was pending, Latimore offered to make an "Alford plea" to manslaughter. Under this plea device, a defendant is permitted to continue to profess his innocence while pleading guilty to certain charges. Alford pleas, while useful in some circumstances, can be a source of concern to crime victims and prosecutors because they allow a defendant to avoid full acceptance of personal responsibility for his actions.

After consulting with the Poirer family, the prosecutor declined Latimore's offer, in part because the victim's family wanted the Commonwealth to pursue a murder conviction. The defendant then moved for an evidentiary hearing on prosecutorial misconduct. He argued that there was a "colorable basis" for believing that the district attorney had subordinated the public interest to the wishes of the victim's family, and that dismissal was therefore warranted. The motion was denied, and Latimore was found guilty of murder in the second degree.

On appeal, the SJC rejected Latimore's claims of prosecutorial misconduct in the rejection of his offer to make an Alford plea. It began by recognizing that while a district attorney has wide discretion in determining whether to prosecute an individual, such discretion is not unfettered. Prosecutorial decisions cannot, for example, be based on impermissible classifications such as race, religion or sex, or because of the defendant's exercise of his legal rights. The question here, however, was whether such discretion can be abused by including consideration of the wishes of the victim's family.

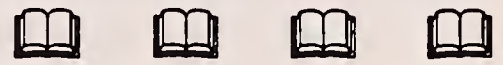
The court held that it could not. "We conclude that consideration of the family's concerns and desires is not the sort of impermissible motive

which justifies judicial inquiry into the district attorney's exercise of discretion." 423 Mass. at 136. In reaching this conclusion, the court looked to several sources within the Victim Bill of Rights. First, it looked to the right of a victim or family member to make a victim impact statement which the judge may consider in imposing sentence. It then looked to a victim's right to request restitution as an element in the final disposition of the case. Finally, it looked to the victim's right to submit a victim impact statement to the parole board, to be taken into consideration in making a parole decision. Drawing from each of these participatory rights, the court concluded that "a district attorney similarly may consider the harm or impact to the victim and the victim's family, when deciding whether to agree with the defendant and ask that the judge accept a plea to a lesser charge or to oppose the judge's acceptance of a defendant's plea to a lesser charge."

Latimore marks the first time the SJC has recognized Chapter 258B, the Victim Rights Law. It establishes, implicitly, that a victim's G.L.c. 258C, § 3(g) right to confer with the prosecutor is, by extension, a right to have the prosecutor take those views into account. In so doing, the decision does nothing to detract from a prosecutor's independence in directing the prosecution of a case. As before, prosecutors maintain the clear obligation to determine and represent the interests of the public, which may or may not coincide with the individual interests of the victim. See e.g. Manning v. Municipal Court of the Roxbury District 372 Mass. 315, 317-318 (1977) (acknowledging prosecutor's discretion to discontinue prosecution despite the victim's wishes). Latimore simply expands on this independence by establishing, explicitly, that a prosecutor's determination of the public interest may properly include consideration of the concerns of those most affected by the crime.

## BULLETIN:

The Attorney General's "Answers to Common Legal Questions and Resources for Victims of Domestic Violence" is now available in English, Spanish, Portuguese, Russian, Haitian, Khmer, Vietnamese, and Chinese. The brochure is designed to assist victims of domestic violence in obtaining needed protection, and was published in direct response to a critical need identified in the findings of the Supreme Judicial Court's Commission to Study Racial and Ethnic Bias. For copies, contact Ange Bresca-Exantus, (617) 727-2200, ext. 2549.



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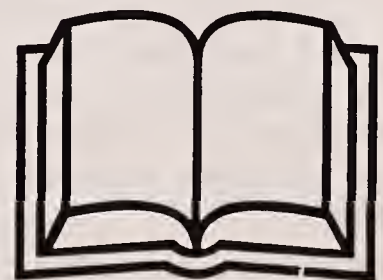
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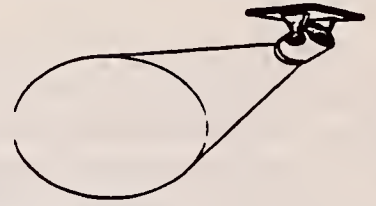
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# **F**ocus on Victim/Witness Assistance Programs



## Northwestern District Attorney Elizabeth Scheibel's Education and Outreach Unit:

### The Greatest Job in the Commonwealth

*Kathleen O'Neill Alexander  
Director, Education and Outreach  
Northwestern District Victim Witness Assistance Program*

When I entered the Senior Center, I was a stranger to the people in the room. I approached one older woman and told her my name was "Kathy." I asked her if she did her banking in Florence. She said "yes" and proceeded to tell me the name of her bank. I learned that she had a checking account, a savings account, and four certificates of deposit. I also learned that her husband had died recently. I moved on to a gentleman in the room and asked how much money he had on him. He told me he had \$34.00. I asked to borrow five dollars for a half hour. He said he was sorry but he only had a ten. I took it. I moved on to another woman and found out that she never locks her door. Another woman told me her favorite song. A man told me the make of his car and how much he paid for it. Then he let me hold the car keys. I moved on.

Finally at 9:00 a.m., the Council of Aging Director walked into the room. She asked everyone to sit down, then announced that there was a guest from the Education and Outreach Program of Northwestern District Attorney Scheibel's Office.

I thanked everyone for inviting me. I then asked if anyone had ever been scammed. "No," they said. "Has anyone ever found out

information about you that you didn't want them to know?" "Certainly not." Then I went around the room and told every one of the 19 participants how I, a stranger, had found out way too much about their personal lives, their finances, their cars, their children's names, etc., and they didn't even know I was the guest speaker. They laughed, seemed a bit embarrassed and were ready to explore personal safety awareness with a focus on frauds and scams. I returned the man's ten dollars.

This is one example of my work as the Director of Education and Outreach in the Northwestern District, consisting of Hampshire and Franklin counties. In August of 1992, then District Attorney Judd J. Carhart created the Education and Outreach Unit. It has been my job to create a programmatic response to the broad-based needs of the community in the area of crime prevention. Under District Attorney Elizabeth Scheibel's leadership and guidance, these efforts focused on collaboration between criminal justice agencies, community service organizations and citizens.

The Education and Outreach Unit works closely with all DA staff to respond to the needs in the district. Our outreach efforts place special emphasis on domestic violence, civil rights, child abuse,

victim witness assistance and consumer protection. I schedule all requests for participation in community events, ranging from lectures, classroom workshops, conferences, panel presentations and committee meetings, to community partnerships and rallies. We do not "market" any one program. Instead, I respond to the specific needs and issues of the organization, school or community group that has approached us, creating "audience-centered" programs designed to meet those specific needs.

The excitement of this position lies in the tremendous diversity of activities we undertake. On any given day I can be at a community task force meeting, followed by a planning session at a police department, followed by an evening program at one of our six area colleges. In one recent four day period, I participated in eight workshops, attended three separate coalition meetings, and clocked 356 miles on my odometer. Twenty years of teaching and sixteen years of anti-violence work have prepared me well for this role.

I train new recruits at the Criminal Justice Training Council academy in Agawam. I also train clergy on domestic violence, teens on dating violence and college students on hate crimes. Wherever there is need, District Attorney

Scheibel gives her support. I am never bored; I am always challenged; and I am always learning. There is a quote that hangs in my office that demonstrates what I think of my job and the way I want to live my life. It reads, "In your vision of the world is the image of yourself." My contributions are an effort to enhance the lives of all of our citizens. For me that is the privilege of serving the Commonwealth. It's why I think I hold the greatest job.

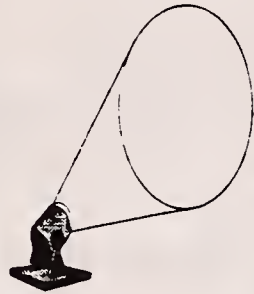
***"I don't believe we can have justice without caring, or caring without justice. These are inseparable aspects of life and work."***



***Justine Wise Polier***

## SUFFOLK COUNTY DISTRICT ATTORNEY RALPH MARTIN'S GANG UNIT:

### The Advocate's Role



***Mary Kelley  
Victim Witness Advocate  
Suffolk County District Attorney's Office***

I am a Victim Witness Advocate in the Suffolk County District Attorney's Gang Unit. It is both a challenging and rewarding position. An advocate's role in a Gang Unit is very different from an advocate's role in other units. Gang cases raise many unique issues. The overwhelming challenge is getting witnesses of gang crimes to come forward. Victims and witnesses of gang crimes usually do not want to enter the criminal justice system for a variety of reasons. The first step in getting these witnesses to come forward is to learn their reasons for not wanting to testify. In some cases, it may be that this victim is more interested in "street justice" and therefore would rather take care of it himself. In most cases, the overwhelming reason is that witnesses are concerned for their safety. They fear retaliation for having testified. The code in the street is "snitches get stitches."

It is very important to spend time talking to these witnesses to figure out why it is that they do not want to testify so that you can then address their concerns. For example, if after talking to a victim, I get the impression that he wants "street justice," I try to convince him that he should let the courts handle it.

Safety concerns are very difficult because they are so realistic. People are terrified to testify in these types of cases. On the one hand, I am faced with a defendant who shot someone. On the other, I am faced with a witness who is scared to death to talk. I try to do whatever I can to alleviate witnesses' safety concerns. I have relocated witnesses to other cities, transferred students to new schools, and asked police officers to do nightly security checks in an effort to make sure the witnesses are safe.

It is this witness reluctance that makes an advocate so necessary in these cases. Without taking the time to talk to people and try to work with their issues and concerns, these cases would go unprosecuted. It takes a lot of persistence and effort, but it is well worth it. During my years as an advocate, I have seen a lot of young men shot and killed or put into wheelchairs. I have seen young children caught in the crossfire. It is this craziness that we are trying to stop. It is very sad that young people have gotten so caught up in this lifestyle. I try to talk to each kid I meet about getting out of gangs. Hopefully, intervention and prevention will eventually prevail, but until then, I do believe that we improve the community for people who live there, and, more importantly, we save lives.

# Focus on Service



## SOME THOUGHTS ON INTERACTING WITH ELDER VICTIMS

*John Sofis Scheft, Esq.  
Attorney General's Elderly Protection Project*

The experience of victimization depends largely on the intensity of the criminal act, and on the victim's personality, life history, and circumstances. These factors -- far more than age -- determine how a victim reacts to crime.

Beyond this general awareness, however, there are some useful perspectives that we can bring to our interactions with elder victims.

- First, we can acknowledge aspects of the elder experience that may increase their stress when exposed to crime. With this understanding, we can be more compassionate and patient when they reach out to us.
- Second, we can be conscious of communicating in ways that allows the elder to feel supported, and enable us to get the information we need to respond effectively.

### THE ELDER PERSPECTIVE

#### 1. Reluctance to Report

Studies overwhelmingly show that elders are reluctant to report that they have been victimized. They may be embarrassed and ashamed; they may fear retaliation or the judgment of authorities and family; they may distrust social service agencies and feel they will lose their independence if they express their "vulnerability"; they may simply lack an awareness of the law enforcement and social service network designed to help them; or they may be cognitively or physically impaired. Whatever the reason, whatever the situation, elders find it difficult to let

professionals know when they are in trouble. For this reason, professionals have to be proactive in listening to elders. They cannot follow a natural societal tendency to minimize or ignore the subtle signs of abuse, neglect or financial exploitation. Seemingly benign comments, unexplained injuries, chaotic family dynamics -- these are the smoke signals that often reveal the abusive fire underneath.

#### 2. Recovery Potential

Physical injuries and financial losses may be beyond the recovery potential of some older victims. A younger victim, suffering the same loss, may have more physical and financial resilience. When elders believe they have no chance of becoming "whole" again, the impact of the crime becomes more intense.

#### 3. Losses and Adjustments

Generally speaking, older people have experienced a series of losses caused by events other than crime. They may have lost spouses, children (even if they only moved away), friends and relatives; jobs and levels of income; the ability to drive; and sometimes their health. They have also had to adjust to other changes in their lives -- such as advances in technology and evolving social attitudes. While most elders recognize that this flux is natural and usually learn to cope, their sense of loss is compounded when aspects of their lives that they do control -- like mobility, social interaction, and financial independence -- are affected by crime. Elders find it especially hard to

tolerate *any* victimization that impacts their remaining quality of life.

### THE PROFESSIONAL'S PERSPECTIVE

#### 1. Understanding Anchors Patience

Depending on the individual, any one of these factors may intensify (and even distort) the elder victim's experience of the criminal act. Seeing this type of reaction as a natural and temporary condition helps the professional remain patient when working with older victims. The professional is in a better position to help elders reconnect with their feelings of independence. This psychological control can be encouraged in ways that are useful to law enforcement -- such as a willingness to cooperate with authorities, identify the perpetrator, and testify in court. Equally important, this healthy state of mind helps elders accept support from agencies in the community -- like elder protective services or the Council on Aging -- which is most often the ingredient in a successful long-term intervention.

#### 2. Principles of Assistance

Within this emotional framework, communication is enhanced by remembering certain principles:

**Assume Mental Capability:** Remember that the shock of the experience may *initially* block the ability to recall details or even speak rationally. This can happen to younger people too. It is a myth that the majority of people over 65 have defective memories. While most elders may experience some loss of

memory speed, only 15% of adults over 60 have significant memory problems. If professionals interact with the expectation of mental capability, they will be less likely to misjudge the elder's competence. On the other hand, in cases where mental difficulty becomes apparent, professionals will act appropriately.

#### **Show Respect. Establish Rapport:**

Showing respect is common sense, but it deserves mention because sometimes service providers (with the best of intentions) try to ingratiate themselves with elders by being "cute" -- for example, using terms such as "young fella" or "old timer." Older people interpret such expressions as signs of disrespect and talking down to them. A simple way to demonstrate respect is to instill in the elder a sense of control during the interview. This can be accomplished by asking the older person what they like to be called, asking for permission to sit down, explaining why you are there, and emphasizing that the elder has a choice about whether to participate in the investigation. Being *sensitively* honest about the case, the likelihood of success, and so forth, also contributes to the level of respect because it communicates to the elder that the professional sees him or her as an equal partner with a stake in the outcome.

Rapport exists when the elder feels a human connection with the professional that transcends the professional's role. The elder feels valued not as a victim, not as an older person, but simply as another human being. Establishing rapport is easier than it sounds -- a sincere greeting, an interest in the elder's life beyond the victimization, simply listening without judgment -- these connections can happen in the moment and set the stage for the whole intervention.

Some professionals mistake rapport for indulgence, feeling that they must listen to an elder's incessant talking for fear of being seen as rude. Yet professionals who establish

rapport find that they can direct and focus conversations without being perceived as rude. Ironically, it is the foundation of rapport -- just connecting with the elder on a human level -- that allows the professional to get the job done efficiently. Once elders understand that the professional cares about them, it is easier to accept ground rules for a professional relationship. They understand that the professional has a job to do and that there are limits on how much attention their case receives.

Interestingly, a study of police / victim interaction in Milwaukee found that elders were more likely to participate in the court process and to appreciate the police effort when they felt the initial responding officer "cared" about them as a person and expressed appropriate sympathy. Officers who exhibited this level of rapport solved *twice* as many crimes as officers who failed to make this connection -- even though the study found that both groups of officers engaged in the same investigative techniques!<sup>1</sup> In other words, rapport is the engine that drives victim satisfaction, which enhances the intervention. Sometimes professionals believe that technical competence is sufficient by itself, with the nature of the interaction being considered as an afterthought.

#### **Respond to Handshake and Touch.**

**Adjust Body Posture.** Because they are stressed, some elders may hold a handshake longer than would normally be expected; some may periodically touch the responding professional. Professionals should not pull away before the elder releases. Allowing this physical reassurance (within reason) can help to calm an elder to a greater degree than just about anything the professional can say. It also helps to remain at eye level of older victims; ask to sit when they sit. Do not stand over them. Tone down all body language, which will help them to relax. Some older people stand close to others. This may be their normal tendency, or they may be compensating for hearing or sight

difficulties. Be sensitive to this tendency (again, within reason) by avoiding the urge to back away.

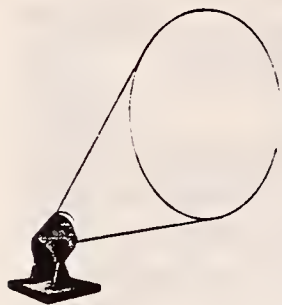
#### **Expect and Accommodate Sight and Hearing Difficulties.**

Professionals face a distinct challenge: they must be able to recognize when elders have difficulty seeing or hearing, and then compensate for the problem. Many people (of all ages) tend to mask their hearing or vision problems out of embarrassment. In addition, the traditional respect that most older persons have for professionals can further mask their difficulties if they are reluctant to ask that the professional repeat statements, explain the meaning of certain terms, help them read the fine print on a form, or move from an area where intense lighting is causing glare. These are just a few examples of how the environment in which the interaction takes place, coupled with the elder's sight and hearing limitations, can impact on the level of communication. Failing to pay attention to this dynamic can mislead professionals into thinking that the older person is mentally deficient or disinterested in resolving the matter. More dramatically, inattention may allow a situation to go unaddressed when better communication would have made a difference.

#### **CONCLUSION**

Communication techniques are less important than communicating consciously. No technique is as effective as responsive listening and talking in the moment, guided by the principles discussed above. By being conscious of the elder's state of mind and possible physical, sight and hearing limitations, the responding professional will adjust to make the most of the interaction. A sense of rapport is the foundation for a strong interview that will offer the best hope of solving the case or intervening in whatever way is most needed.

<sup>1</sup> Zevitz et. al., "Factors Related to Elderly Crime Victims' Satisfaction with Police Services: The Impact of Milwaukee's 'Gray Squad'" *Gerontologist*, Vol. 31, No. 1 (1991).



## VOCA FUNDED HOMICIDE BEREAVEMENT PROGRAMS

*Alyssa Kazin, Victim Services Program Specialist  
Massachusetts Office for Victim Assistance*

Massachusetts receives annual grants under the federal Victims of Crime Act (VOCA) of 1984 to fund direct services to victims of violent crimes. These grants are financed by the federal Crime Victims Fund which receives millions of dollars each year from criminal fines, forfeitures and special assessments made against convicted criminals in federal courts. The federal grants are administered by the Massachusetts Office for Victim Assistance and distributed as subgrants through a competitive application process to community-based nonprofit agencies in the state.

VOCA-funded services are intended to respond to the immediate needs of crime victims, reduce the severity of psychological consequences of victimization, help restore a victim's sense of dignity and self-esteem, and assist and encourage victims to participate in the criminal justice system. Specific examples include crisis intervention, short and long term counseling, support groups, therapy, advocacy and community crisis response services.

Federal guidelines require states to allocate at least 10% of their VOCA funds to victim populations in each of the following priority areas: child abuse, adult sexual assault, domestic violence and a "previously underserved" victim population defined by the state. Massachusetts has selected survivors of homicide victims as the fourth priority area.

The homicide bereavement services VOCA funds for survivors of homicide victims are highly specialized. Currently, 10 homicide bereavement programs statewide are funded to offer support, information, advocacy, and group, family and individual counseling to survivors of homicide victims. Most services are offered at no cost to victims. The program staff have special training in working with and advocating for survivors of homicide victims.

*If you are interested in receiving more information from a particular program, please contact the program nearest you:*

Beverly: Victims of Crime and Loss  
Contact Karen Tompkins (508) 927-4506

Brockton: Survivors of Homicide Victim Program  
Contact Christine Mullin (508) 583-6498

Greenfield: Homicide Bereavement Program  
Contact Robin Yerkes (413) 774-7931

Lawrence/Somerville/Quincy:  
OMEGA Support Services  
Contact Bette Spear (617) 776-6369

Marlboro/Framingham:  
Family Bereavement Program  
Contact Stephanie Stilla-Pietre (508) 481-8290  
ext. 110

Metrowest/Plymouth/State Office:  
Mothers Against Drunk Driving  
Contact Diane St. George (508) 875-3736

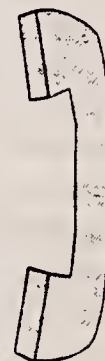
New Bedford/Plymouth/Hyannis: Project REACH  
Contact Denise Nunes (508) 996-3147

Roxbury/Boston: Living After Murder Program  
Contact Katherine Manners (617) 541-3790  
ext. 733

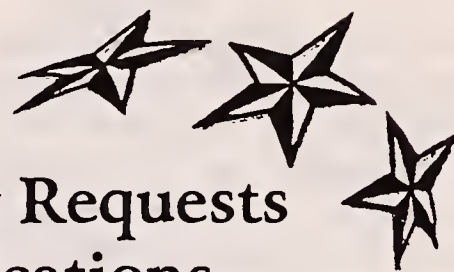
Springfield: Surviving After Murder Program  
Contact Alisa Beaver (413) 732-7419

Worcester: After Homicide Program  
Contact Maureen Ahearn (508) 791-3261

For more information, contact Alyssa Kazin,  
Victim Services Program Specialist, at the Mass  
Office for Victim Assistance, (617) 727-5200.



# Features:



## Protocol For Responding to Discovery Requests For A Victim's Privileged Communications

*Elisabeth J. Medvedow, Assistant Attorney General  
Criminal Bureau*

Criminal defendants often seek access to confidential counseling records of victims during the discovery phase of criminal prosecutions for rape or sexual assault. In so doing, the victim's legislatively protected privacy rights become pitted against the defendant's federal and state constitutional rights to a fair trial. The legal issues have engendered significant debate and in Commonwealth v. Bishop, 416 Mass. 169 (1993) and the recent case of Commonwealth v. Fuller, 423 Mass. 216 (1996), the Supreme Judicial Court (SJC) established procedures that must be followed when such documents are sought.

This article discusses the procedures that must be followed prior to disclosure of a victim's confidential counseling records in a criminal case. In complying with these procedures, prosecutors should be mindful that the Victim Rights Law imposes additional obligations on them, regardless of whether a discovery request is directed toward the Commonwealth or the victim's counseling center. In either case, the victim is entitled not only to be notified of, and present at, court proceedings relating to the release of her records, but also "to confer with the prosecutor ... prior to any hearing on motions by the defense to obtain the victim's psychiatric or other confidential records." G.L. c. 258B, § 3 (g). Consequently, even when the Commonwealth is not a direct party to a discovery dispute over a victim's confidential records, prosecutors play a vital role in

ensuring that the privacy rights of the victim are protected.

Counseling record disputes generally arise when a defendant files a Motion to Compel Production of Documents asserting that a victim's record might contain impeachment evidence, exculpatory evidence, a motive to lie, or in limited cases involving mentally disabled individuals, evidence suggesting that the victim's perception ability is impaired. The documents requested are often protected by either a qualified or absolute statutory privilege. An absolute privilege, such as the sexual assault counselor privilege under G.L. c. 233, § 20J, does not permit disclosure of confidential communications absent the written consent of the victim. In contrast, a qualified privilege, including the psychotherapist/patient privilege pursuant to G.L. c. 233, § 20B, the social worker/client privilege under G.L. c. 112, §§ 135, 135A, 135B, and the domestic violence counselor privilege embodied in G.L. c. 233, § 20K, are less protective of a victim's personal records and allow disclosure in limited circumstances. Regardless of whether a privilege is absolute or qualified, however, our state courts have, on occasion, ruled that a criminal defendant's constitutional rights trump a victim's statutory privilege.

During the last ten years, the Supreme Judicial Court has frequently addressed the issue of precisely when a victim's private records must be turned over to a

criminal defendant. Originally, in Commonwealth v. Two Juveniles, 397 Mass. 261 (1986), a case involving absolutely privileged records, the SJC held that if a defendant could show a "legitimate need for access" to a victim's confidential materials, the court would conduct an in camera inspection of the materials; that is, a private review of the documents by the judge, in chambers, outside of the presence of either party's counsel. Many years (and many cases) later, in Commonwealth v. Bishop, 416 Mass. 169 (1993), a case involving the qualified psychotherapist/patient privilege, the SJC retreated from the standard of "legitimate need" and held that to warrant an in camera review of a victim's confidential documents, a defendant need only show that the material is relevant to his defense. The SJC then set forth a five-stage protocol to be followed where discovery requests are made for a victim's privileged communications (outlined below). The Bishop case caused a great deal of confusion in the legal system, primarily due to the fact that the privilege at stake in Bishop was statutorily qualified, not absolute, such as the privilege invoked in the Two Juveniles case. The legal and victims' rights communities were unclear as to whether a defendant seeking access to a victim's private communications had to now demonstrate a "legitimate need for access" to the documents, or merely show the records were "relevant" to his defense.

Last summer, in Commonwealth v. Fuller, the SJC finally

clarified the application of the Bishop protocol, as well as the standard which a defendant must meet to justify an in camera inspection of a victim's records protected by an absolute statutory privilege. In Fuller, the criminal defendant subpoenaed a victim's sexual assault counseling records from the Rape Crisis Center of Central Massachusetts, Inc. The lower court ordered the records to be turned over, and the director of the Rape Crisis Center refused. As a result, she was held in contempt of court. A single justice of the Massachusetts Appeals Court stayed the judgment of contempt pending appeal. On its own motion, the Supreme Judicial Court transferred the case to the court.

In its decision, the SJC acknowledged the difficulty generated by its Bishop ruling and explained that it had not intended "to establish a standard and protocol that would result in virtually automatic in camera inspection for an entire class of extremely private and sensitive privileged material. To do so would make the privilege no privilege at all, and would substitute an unwarranted judicial abridgment of a clearly stated legislative goal." Fuller, 423 Mass. at 224. The court then explicitly increased the burden a defendant must satisfy when attempting to get a victim's rape counseling records. As opposed to the lower relevancy standard announced in Bishop, the SJC held that a defendant seeking § 20J records must now demonstrate that the documents are material to the "issue of [his] guilt". Fuller, 423 Mass. at 226. The SJC reaffirmed that in all respects other than the higher standard imposed on defendants seeking § 20J records, the five-stage process established in Bishop applies to all situations where a victim's privileged and confidential communications are sought. Those five steps, incorporating the new Fuller standard, are as follows:

### 1. Stage One - Privilege Determination

If a defendant moves for access to records of the victim and the victim or the Keeper of the Records seeks a protective order or refuses to produce the documents on the ground that the documents are statutorily privileged, the matter goes before a judge. The judge must issue a written decision, stating specifically which privilege or privileges would statutorily protect the documents from disclosure, and why.

### 2. Stage Two - Materiality or Relevancy Determination

If the judge decides that all or some of the documents requested are privileged, a defendant who is seeking rape counseling records privileged under G.L. c. 233, § 20J, must submit a written memorandum of law explaining the theory under which he believes the records are likely to be material to his defense. Materiality is defined as "evidence which is not only likely to meet criteria of admissibility, but which also tends to create a reasonable doubt that might not otherwise exist". Commonwealth v. Fuller, 423 Mass. at 226. In this circumstance, the defendant must demonstrate a "good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt". Id.

A defendant who is seeking documents other than rape counseling records protected by § 20J, must file a written memorandum of law which establishes that the requested documents are likely to be relevant to his defense. A defendant cannot simply embark on a fishing expedition, but must be able to demonstrate a likelihood that the records contain relevant information.

The court will then either deny the motion in its entirety, ending

the matter, or will find that the defendant has met the requisite threshold burden and conduct an in camera review to identify the material or relevant documents. The SJC advises lower court judges to also identify the irrelevant documents in the event of an appeal. Given the Fuller decision, judges reviewing § 20J records are advised to identify all immaterial documents. The documents would then be sealed and forwarded to the reviewing court.

### 3. Stage Three - Access to Documents

After the in camera review, both defense counsel and the prosecutor will receive access to those records which the court has identified as material or relevant "for the sole purpose of determining whether disclosure of the relevant [or material] communications to the trier of fact is required to provide the defendant a fair trial." Bishop, 416 Mass. at 182. In order to provide maximum protection to the records, the SJC directed that public disclosure should only occur where "absolutely and unavoidably necessary", and toward that end, included a sample protective order in the appendix to the Bishop case. Bishop, 416 Mass. at 189. Counsel may review the documents in their capacity as "officers of the court" only. Id. at 182.

### 4. Stage Four - Disclosure of Documents

The defendant bears the burden of proving to the court, in writing, that disclosure is necessary to provide him a fair trial. Any doubts, according to the SJC, must be resolved in favor of the defendant, not the victim. Bishop, 416 Mass. at 183. Lower courts must issue written rulings outlining the reasons why disclosure is or is not warranted, identifying any undisclosed information for appellate purposes.

## 5. Stage Five - Trial

At trial, the judge must determine whether the identified relevant or material documents are admissible in evidence, keeping in mind the rape shield statute, G.L. c. 233, § 21B, which prohibits disclosure of a victim's prior sexual history.

Practically speaking, prosecutors rarely have in their control, custody or possession records of a victim's privileged communications. Accordingly, when a defendant files a discovery request in the course of a criminal proceeding seeking the confidential records of a victim, the prosecutor should oppose the motion, asserting that the documents are not in the possession of the Commonwealth. Moreover, contrary to the belief of many defense lawyers, and even some judges, a prosecutor is not obligated to find out if a victim has received counseling. Compliance with Mass. R. Crim. P. 14(a)(1) does not extend to documents not in the possession, custody or control of the Commonwealth. See, e.g., James Pridgen v. Commonwealth, SJ-94-0643.

A fundamental goal of the criminal justice system is to encourage victims to seek criminal prosecution of their abusers, and to help victims through the process. Accordingly, we need to provide maximum protection from disclosure of a victim's sensitive and confidential counseling records arising from an assault or other criminal incident. Prosecutors and victims' rights advocates facing discovery requests for these type of private communications should vigorously oppose the requests, challenging the defendant's motive for seeking the documents and asserting that the preliminary threshold necessary to trigger consideration by the court has not been satisfied. Lastly, if a defendant serves a subpoena duces tecum on a Rape Crisis Center seeking access to one of its client's confidential records, the Keeper of the Records for that center must be notified of any court proceeding and be given an opportunity to be heard. Fuller, 423 Mass. at 220 n.3.

## WHEN VICTIMS GET SUED: A Remedy Against The Harassing Lawsuit

*Pamela L. Hunt, Assistant Attorney General  
Chief, Appellate Division, Criminal Bureau*

More often than should be the case, victims and witnesses find themselves having to defend against lawsuits brought against them because they have reported crime to the authorities, cooperated in the investigation, or testified in court. These lawsuits are brought by criminal defendants both before and after trial, and have as their primary purpose intimidation and harassment.

Being sued, even when the lawsuit is baseless, is very distressing and tremendously burdensome. Victims often fear that if others find out that they have been sued, they will be viewed as having done something wrong. Furthermore, victims who are sued have to decide whether to defend the lawsuit themselves or hire counsel to represent them. Realizing that they are unfamiliar with the law or how to go about defending themselves, they have to either take the risk that they will make a serious legal mistake or spend money to hire an attorney. A person who has done what those in law enforcement have asked her or him to do -- report crime and cooperate in the prosecution -- and who has thought the ordeal was over, is faced with the uncertainty, emotional strain, and financial risk that a lawsuit entails. Allowing this kind of lawsuit to be maintained permits continuing victimization even after the criminal trial is over and the defendant has been convicted. And since state officials are not permitted to provide legal representation to private citizens, victims and witnesses have had to deal with these lawsuits themselves.

### TRADITIONAL LEGAL REMEDIES HAVE BEEN INADEQUATE

The law has long provided that a person cannot be held civilly liable for reporting information to an appropriate governmental authority charged with enforcing the law. It also grants absolute immunity for testimony given in court. Under these prevailing legal principles, rooted in the common law, a victim or witness who is sued for his or her role in a criminal prosecution will generally prevail, but until recently, the law provided no protection from having to go through the process of defending such lawsuits. In addition, some lawsuits brought against victims or witnesses may not appear on their face to be based on the victim's role in reporting crime or testifying. A convicted defendant, who is frequently indigent and so can file a lawsuit without cost, can claim anything. It then falls to the person being sued to show the suit is baseless.

### A NEW REMEDY: ANTI-SLAPP STATUTE

The Massachusetts Legislature has now provided a means by which persons who have been made the subject of civil litigation in retaliation for exercising their right to petition the government may be spared the expense

and burden of defending these lawsuits. The 1995 law, which Attorney General Harshbarger actively supported, created G.L. c. 231, § 59H, in order to regulate Strategic Lawsuits Against Public Participation, or SLAPP suits. SLAPP suits are civil actions brought to penalize or deter a party's exercise of the right to petition government. The statute allows for the early dismissal of lawsuits which are based on the exercise of the right to petition government.

### "RIGHT TO PETITION"

The right to petition government is guaranteed by both the First Amendment to the United States Constitution and the Massachusetts Constitution. The definition of "right to petition" in § 59H, however, is much broader than the constitutional language. It includes:

...any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding...; or any other statement falling within constitutional protection of the right to petition government.

By defining the right of petition to include virtually any communication with governmental officials considering an issue or which encourages governmental consideration or action on an issue, the Legislature has provided relief to

those persons who have been sued for retaliation and intimidation because of the exercise of their constitutional and other protected rights. In so doing, it has recognized the important public interest in encouraging citizens to come forward and speak freely with police and prosecutors without fear of retaliation.

Anti-SLAPP statutes in some other states are more narrowly drawn, and were originally enacted in part to address the problem of retaliatory lawsuits brought by real estate developers against citizens who engage in lawful activity and procedures to challenge real estate development. The Attorney General's Office has taken the position, however, that the Massachusetts statute applies to lawsuits that are brought against victims and witnesses who assist in the enforcement of criminal laws.

### HOW THE STATUTE WORKS

A person who asserts that a lawsuit has been brought against him or her on account of the exercise of the right to petition government may file a "special motion to dismiss," which asserts that the suit has been brought because of "petitioning" activity. G.L. c. 231, § 59. Once such a motion has been filed, it should be heard and decided "as expeditiously as possible." This is an important provision as civil litigation can often be very protracted.

Upon the filing of a special motion, all civil discovery proceedings -- including depositions, interrogatories and document requests -- are automatically stayed until the court rules on the special motion. This provision strikes a hard blow at a person who brings a lawsuit in order to harass because it operates quickly to prevent the very harassment that is the purpose of the suit.

The burden then shifts to the plaintiff. Under the statute, the Court "shall" grant the special motion unless the nonmoving party meets his burden of showing:

- (1) that the exercise of the right to petition was devoid of any reasonable factual support or any arguable basis in law; and
- (2) that actual injury resulted.

Thus, once the motion is filed, the focus is on the legitimacy of the petitioning of government, and not on the injury on which the lawsuit is allegedly based. A SLAPP suit may be brought directly because of the petitioning activity, but is more often brought as an ordinary tort action, and so is said to "masquerade" as an ordinary lawsuit, on its face appearing to have no relation to the petitioning activity. Through careful drafting, a plaintiff may assert a claim unrelated to the acts that constitute petitioning, and still accomplish the intimidation and harassment intended, and through the costs and inconvenience of defending the suit, make the exercise of the right to petition prohibitively expensive. This is precisely what the statute is designed to prevent. The Legislature chose to provide a defense to a harassing suit even where a clever plaintiff may be able to appear to raise a valid claim that seems to have nothing to do with the petitioning.

In order for the lawsuit to continue after a special motion is filed, a plaintiff cannot merely argue that he might have a valid claim, or that there is a dispute over the validity of the lawsuit's claims. Rather, the inquiry shifts to an examination into the civil defendant's "petitioning." The plaintiff must show essentially that there was no reasonable factual or legal basis in the petitioning

activity, which may be similar to showing that the petitioning was a "sham." So long as there was some factual or legal justification for the petitioning of government, the lawsuit must be dismissed.

Finally, in an obvious effort to encourage lawyers to take on the representation of persons who are sued for exercising their right to petition government, the Anti-SLAPP statute provides that a person who is successful on a special motion to dismiss may recover costs and attorney's fees. This provision helps ensure that the party being sued can obtain private counsel in his or her defense.

#### ROLE OF THE ATTORNEY GENERAL

The statute also provides that the Attorney General "may intervene to defend or otherwise support" a party who files a special motion to dismiss. In this, the Legislature recognized the unique position and experience of the Office of the Attorney General. As chief law enforcement officer of the Commonwealth, the Attorney General is charged with upholding the law, ensuring the uniform, fair, and faithful application of the law, and representing the public interest. *E.g., Feeney v. Commonwealth*, 373 Mass. 359, 365 (1977). The Attorney General, who generally has no interest in the merits of a dispute in which the statute is involved, is able to provide the court with special insight on the importance of the exercise of constitutional and statutory rights of petition, and of the effect of litigation strategies that chill the exercise of those rights.

The Attorney General may only assist in a case where a special motion has been filed.

#### CONCLUSION

Prior to the enactment of the Anti-SLAPP statute, the Attorney General's Office was aware that lawsuits were being brought by criminal defendants against victims and witnesses involved in criminal prosecutions. Sometimes the suits were brought prior to trial to deter witnesses from further cooperating in the prosecution or to obtain a strategic advantage in a pending case. At the request of a District Attorney's office, the Attorney General has on a number of occasions successfully intervened in these civil suits, on behalf of the Commonwealth, to protect the witnesses from harassment and to limit the criminal defendant to the discovery permitted by the court in the criminal case. This has provided some measure of protection, but once the criminal case was over, the civil case could go forward. The Commonwealth could only be involved to the extent necessary to prevent the civil suit from being used to collaterally attack the validity of the criminal conviction but there was nothing to protect the victim or witness from having to go through the process of defending the suit. Other times lawsuits were brought after a criminal conviction. Not only was there no legal means by which the Attorney General or a District Attorney could assist, but it was very clear that these suits, legally without merit, were achieving their intended effect of punishing and harassing those who cooperated in a criminal prosecution.

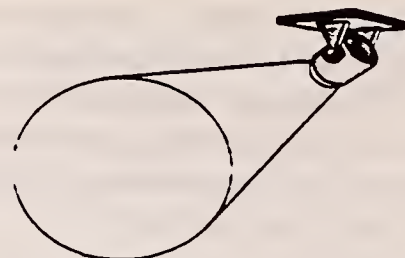
The Anti-SLAPP legislation provides a real remedy for those who are sued because they have reported crime, cooperated with the authorities in the enforcement of criminal laws, or provided assistance and support to a victim of crime. The Attorney General's Office has intervened, under the statute, in SLAPP suits brought by convicted defendants against victims and witnesses where special motions to dismiss have been filed. If those cases are successfully dismissed, it is hoped that this type of retaliatory lawsuit will become a thing of the past. It is important, however, for victims and witnesses to know that they now have a remedy by which they can resist efforts to punish them for exercising their right to petition government.

**For Victim  
Assistance  
Resource and  
Referral  
Numbers,  
please see  
page 21.**



# **F**ocus on Victim Compensation

## **VICTIM COMPENSATION: DECIDING WHO IS ELIGIBLE**



**David B. Andrews, Assistant Attorney General  
Deputy Program Director  
Victim Compensation and Assistance Division**

**Judith E. Beals, Assistant Attorney General  
Chief, Victim Compensation and Assistance Division**

Through G.L. c. 258C, the Attorney General's Victim Compensation and Assistance Division provides direct statewide services to crime victims struggling with the financial impact of crime. Eligible victims and their families can receive up to a maximum of \$25,000 per crime, for medical, dental and mental health counseling expenses, funeral expenses and loss of wages or income. The Division also provides information, assistance and referrals to crime victims in addressing their broader needs, and in explaining their rights and responsibilities in the criminal justice system. Last year, the Division awarded a record \$4.26 million in compensation to Massachusetts crime victims.

In order to fulfill its mission of assisting as many crime victims as possible, the Division relies heavily on referrals from other victim service and criminal justice professionals who come into direct contact with victims of crime. It is therefore vitally important that advocates, police, prosecutors, judges, court personnel, clerk-magistrates, shelters and others have basic information about whom this program can assist, and to what degree. This article -- the first in a series -- discusses the definitions of "victim" and "crime" that determine basic qualification for victim compensation.

### **WHAT IS A "VIOLENT CRIME" FOR PURPOSES OF THE STATUTE?**

G.L. c. 258C is known as the "Victims of Violent Crime Compensation Act". As defined in the Division's governing regulations, 940 CMR 14.00, the term "crime" includes:

- any criminal act involving the application of force, intimidation or violence *or* the threat of force, intimidation or violence by the offender upon the victim;
- any violation of drunk driving laws (G.L.c. 90, §§ 24-24O); and
- any conduct that would constitute a violation of G.L.c. 209A, the Abuse Prevention Act.

The regulations adopt a broad definition of violent crime that does not require physical harm or injury. At the same time, most property and white collar crimes do not currently qualify, unless the crime is engaged in for the purpose of intimidation. Examples of qualifying property crimes include hate crimes and domestic violence arsons. In these cases, the Division can establish eligibility and assist with qualifying mental health counseling expenses. Property losses, however, can only be recovered through an order of restitution at the time of sentencing.

### **HOW DOES THE DIVISION ESTABLISH THAT A "CRIME" OCCURRED?**

In order for the Division to determine that a qualifying crime has occurred, it is not necessary that the crime result in a conviction, or even a criminal complaint or indictment. Generally, a police report will suffice. Other options include a 10-day order issued under chapter 209A or a substantiated report of abuse to the Department of Social Services under chapter 119, §51A. In circumstances where investigating authorities are reluctant to release reports of an incident under investigation, the Division utilizes a "Law Enforcement Verification of Crime Information" to be completed by the investigating officials. This verification is sufficient to establish that a crime has occurred and that the applicant meets all other eligibility requirements.

### **WHO IS ELIGIBLE FOR VICTIM COMPENSATION?**

Once the Division determines that a crime has occurred, and that other eligibility requirements have been met, the statute provides for a maximum award of \$25,000 per crime. If there are several direct victims, each victim is considered the victim of a separate crime, and is potentially eligible for the maximum award.

A direct victim is defined as a person who suffers personal physical or psychological injury or death as a direct result of:

- a crime committed against him;
- attempting to assist a person during the commission of a crime against that person; or
- efforts to prevent a crime from occurring in his presence or to apprehend a person who committed a crime in his presence.

Sometimes, several people will file claims arising out of a crime against one direct victim. In this situation, the related claims are joined under one claim (the claim of the direct victim), and the aggregate award to all of them cannot exceed \$25,000. If the total losses of co-claimants exceed \$25,000, the award is divided proportionally based on each claimant's losses.

The individuals who can join in the claim of the direct victim include:

- dependents and family members of homicide victims. These persons are eligible for mental health counseling expenses, and may be eligible for loss of the victim's financial support. "Dependents" are defined to include "any person who is wholly or partially dependent for

support upon the victim at the time of his death." As such, the Division is generally able to assist gay and lesbian partners of homicide victims, in addition to persons related by blood or marriage;

- any person who incurs the expense of a victim's funeral, regardless of their relationship to the victim;
- children who have observed the commission of a crime against a family member, even though they are not the direct target of the violence. These claimants are generally eligible for mental health counseling services; and
- family members of victims who are "homemakers" (defined as persons whose sole occupation at the time of the crime and for one year preceding the crime was limited to performing the duties and responsibilities of a homemaker). When these family members cease or reduce employment in order to assume the homemaker responsibilities that the victim is no longer able to perform, the Division is able to assist them with lost wages. Generally, this issue arises where a homemaker is injured or killed, and a relative stops or reduces employment in order to care for the victim's children and/or the victim. In this

situation, the Division can reimburse the family member for some or all of his or her lost earnings.

The Division's eligibility determination process does not end once it concludes that the claim has been filed by a claimant of a qualifying crime. Other questions then come into play, including reporting and cooperation requirements and, in rare cases, questions of contributory conduct. These issues will be addressed in future articles. In the meantime, it is important to remember that, in the vast majority of cases, eligibility requirements present no barrier. Last year, fewer than 8% of claims received by the Division were determined ineligible. The far greater concern -- and the one the Division is most interested in addressing -- is in ensuring that every crime victim, every family member and every other person who is potentially eligible receives the information and referrals necessary to access this important program.

Division staff are always available to "pre-screen" claims and to answer questions about eligibility. For more information, or if you would like to receive our brochure/application, please contact Deputy Program Director David B. Andrews at (617) 727-2200, ext. 2566.

## **BULLETIN:**

### **Victim Compensation Training Video Available.**

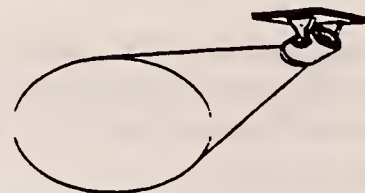
The Attorney General's Office and Continental Cablevision have produced a public affairs program on victim compensation. The program, which runs 30 minutes in length, is an excellent training tool and includes interviews with victims who have received assistance through the Office's Victim Compensation Division.

For a copy, please contact David Andrews at (617) 727-2200, ext 2566.



# F

## ocus on Legislation



### ADVANCING VICTIM RIGHTS AND REDUCING FUTURE VICTIMIZATION: The Attorney General's Legislative Package

*Carolyn Keshian, Assistant Attorney General  
Family and Community Crimes Bureau*

Each year, Attorney General Harshbarger sponsors and supports many legislative proposals that are of vital importance to the victim community. A number of these bills have been introduced this legislative session, on issues including domestic violence, victim compensation, victim privacy, firearms, drunk driving, and victim/witness protection. These bills are summarized below.

#### DOMESTIC VIOLENCE

Attorney General Harshbarger is proposing new legislation (to be filed) to strengthen several laws relating to domestic violence. The legislation, portions of which the Attorney General has filed in previous sessions, gives new tools to police and prosecutors to respond to incidents of family violence, and includes three provisions which the Attorney General considers to be vital necessary. Among other things, the legislation:

- Enables the court to order abuse prevention orders for a period of time of up to five years, when the court determines that an extended protection order is necessary. Under current law, abuse prevention orders expire after one year in every case;
- Doubles the penalty for offenders who repeatedly violate abuse prevention orders. Currently, the maximum penalty available for violation of a restraining order is two and one

half years in a house of correction. The Attorney General's proposal provides that any second or subsequent violations of restraining orders will be punishable by up to five years imprisonment in state prison;

- Creates the crime of aggravated assault, which provides strong penalties for assault and battery resulting in or creating a threat of serious bodily injury, committed upon a pregnant woman, or committed in violation of an abuse prevention order. A person convicted of aggravated assault may be punished by imprisonment for up to ten years.

#### VICTIM COMPENSATION

The Attorney General, along with Senator William Keating and Representative Sal DiMasi, has proposed a package of amendments to the Victim Compensation Law. These amendments would expand the program by enabling it to address certain pressing financial needs of crime victims that are not otherwise generally met by restitution orders or by other victim service programs. In addition to the funeral expenses, medical and mental health counseling expenses, and lost wages that are already covered by victim compensation, Senate Bill 980 would permit the program to assist victims in paying for:

- moving costs to protect the victim from imminent danger of continuing harm by the offender;
- the cost of cleaning the crime scene, if the crime occurred in the victim's home or motor vehicle;
- the cost of replacing the victim's clothing, bedding and other personal items held by law enforcement officials for evidentiary purposes;
- the cost of replacing the victim's locks, if the crime occurred in the victim's home;
- mental health counseling expenses for non-offending family members of sexual assault victims; and
- ancillary expenses related to the death of a victim including travel expenses to identify the body or to attend the funeral, or lost wages to attend the trial.

The bill would also expand the definition of "crime" to include acts of terrorism committed outside the United States against residents of the Commonwealth. Future federal Victims of Crime Act (VOCA) funding of the Massachusetts program is conditioned on adoption of this amendment by April, 1997. The bill is currently pending before the Judiciary Committee.

## DOMESTIC VIOLENCE AND CHILD CUSTODY

Attorney General Harshbarger strongly supports the enactment of Senate Bill No. 775/ House Bill No. 1948, *An Act Protecting Children From Domestic Violence In Custody And Visitation Proceedings*, filed by Senator Cheryl Jacques and Representative David Cohen. The bill creates a rebuttable presumption that parents who perpetrate a "pattern or serious incidence" of abuse against their spouses or children will not receive custody of the children in divorce, separation, and paternity proceedings. In addition, Senate Bill No. 775/House Bill No. 1948 provides for the court to make provisions, such as supervised visits, to help ensure for the safety and well being of the child and abused parent when allowing visitation with the abusive parent.

## PRIVACY OF VICTIMS' COUNSELING RECORDS

Safeguarding the confidentiality of victims' counseling records to the full extent permissible under the Constitution is critically important. Therefore, Attorney General Harshbarger, Senator Cheryl Jacques, Representative David Cohen, and many other legislative leaders have refiled Senate Bill No. 773, *An Act To Protect The Privacy Rights Of Victims Of Sexual Assault And Domestic Violence*. This bill preserves the confidentiality of victim/counselor records unless access to the records is constitutionally compelled. Senate Bill No. 773 incorporates the principles the Supreme Judicial Court recently articulated in *Commonwealth v. Fuller* (1996), which strictly limited access to a victims' rape crisis counseling records, and the bill extends these protections to victims who turn to other counselors, including school counselors, licensed social workers, domestic violence counselors, mental health facilities, psychotherapists,

and counselors at the Department of Mental Retardation.

## FIREARMS

### 1. Assault Weapons Ban

Attorney General Harshbarger and Senator Cheryl Jacques have refiled Senate Bill No. 148, *An Act Relative To Assault Weapons*, to ban the possession and sale of assault weapons. The bill also includes stricter penalties for:

- Use of a gun in the commission of a felony;
- Illegal trafficking of firearms to a minor or other unlicensed persons;
- Sale of an assault weapon to a minor;
- Possession of firearms by a convicted felon; and
- Gun owners who allow children to gain access to firearms.

### 2. Firearms Permits Restrictions

For several years, Attorney General Harshbarger, along with Representative Paul Caron, Senator James Jaguga, and the Massachusetts Chiefs of Police Association, have filed *An Act Relative To Firearms*, to tighten the laws relating to the issuance of firearms permits to help keep deadly guns out of the hands of dangerous people. The bill, House Bill No. 3691, will strengthen our gun laws and eliminate major gaps which require police chiefs to issue gun permits to convicted criminals, even those who have been convicted of violent felonies, and individuals who are forbidden under federal law from possessing guns. House Bill No. 3691 also establishes a trust fund to support the firearms record keeping system, to provide police with instant access to accurate information about who is authorized to possess firearms. Specifically, House Bill No. 3691:

- Requires firearms identification (FID) card holders to renew the permit every five years, to allow determination as to whether the permit holder remains qualified to possess firearms. Presently, an FID card is valid for life.
- Disqualifies those who have been convicted of any crime punishable by more than two years imprisonment from receiving an FID card or license to carry firearms. Under current law, police chiefs are required to issue FID cards to many persons who have been convicted of violent crimes, such as assault and battery, if the crime is considered to be a "misdemeanor" under state law.
- Disqualifies a person who has been convicted of a felony at any time from receiving an FID card. Presently, police chiefs must issue FID cards to convicted felons after five years from the date of conviction or release from incarceration.
- Establishes a trust fund to support the firearms record keeping system and ensure that it is maintained.

## DRUNK DRIVING

Each year, thousands of people are killed by drunk drivers. Hundreds of others are crippled or injured because of alcohol-related accidents. Because our drunk driving laws need to be strict as well as strictly enforced, Attorney General Harshbarger has sponsored a bill (which has not yet been assigned a bill number by the legislature) that would amend the current drunk driving laws to:

- Restrict hardship licenses to a maximum of 12 hours a day.
- Provide that for a first offense, an individual could not receive a

hardship license for six months rather than the three months currently allowed by statute, and for a second offense, a hardship license could not be issued for a period of one year, as opposed to six months.

- Prohibit the restoration of a driver's license to individuals who refuse to submit to a breathalyzer test as well as a field sobriety test, even when the criminal charges are dismissed or upon an entry of not guilty.

#### VICTIM/WITNESS PROTECTION

In response to the growing number of witnesses and victims who are intimidated or even harmed during criminal trials and investigations, Attorney General Harshbarger is proposing legislation (to be filed) which would establish a formal **Witness Protection Program** in Massachusetts. The program, which would be available on an equal basis to police and prosecutors throughout the Commonwealth, would be overseen by a panel comprised of a municipal police chief, two district attorneys, the Colonel of the State Police, and the Attorney General's office. The program would be funded by small percentages of forfeited bail deposits and assets seized from drug and gaming activities (the bulk of which will continue to be distributed to state and local law enforcement), and would provide the services necessary to protect witnesses and victims so that intimidation does not interfere with their cooperation at trial.

If you have any questions about any of these bills, please contact Carolyn Keshian at (617) 727-2200.

## LEGISLATION SUPPORTED BY MOVA

*Tracy Wadsworth, Policy Analyst  
Massachusetts Office for Victim Assistance*

This year, the Massachusetts Office for Victim Assistance and the Victim and Witness Assistance Board have proposed the following package of bills aimed at strengthening victim rights and services, and holding criminals responsible for their crimes:

**S.1090 - An Act Establishing Crime Victim Restitution.** It is no secret that the current system of ordering, collecting and enforcing restitution from offenders is neither uniform nor effective across the state. This bill, drafted by MOVA, mandates orders of restitution to *all victims* who have suffered financial losses as a result of a criminal's actions, and standardizes procedures for evaluating a defendant's ability to pay and for documenting a victim's losses. It also establishes clear categories of expenses covered by restitution and develops aggressive enforcement mechanisms for its collection. The lead sponsor this year is Senator William Keating, Chair of the Judiciary Committee. The bill has many co-sponsors.

**S.727 - A Proposal for a Legislative Amendment to the Constitution Relative to Victims of Crime.** This amendment to the state Constitution would give victims (or family members if the victim is a minor, deceased or incompetent) the Constitutional right to be notified of and present at all court proceedings, and to be heard at sentencing. It was drafted by MOVA and has been re-filed for the 1997/98 session by Senator Antonioni. The bill has many co-sponsors.

**S.852 - An Act Relative to Profits from Crime.** This bill would prevent criminal defendants from profiting - through books, movies, interviews, etc. - from their crimes. It makes sure that victims have first access to any profits generated from a crime. This bill was redrafted by the Attorney General's office and MOVA, and has been filed this year by Senator Antonioni and many co-sponsors.

**S.1090 - An Act to Establish a Victim Services and Anti-Violence Distinctive License Plate.** This is a new bill initiated by a coalition of grassroots victim service providers and violence prevention groups. The bill was drafted by MOVA and filed by Senator Antonioni. It seeks to create a distinctive license plate to promote public awareness and raise funds for victim services and violence prevention programs.

In addition, MOVA and the Board have endorsed the Domestic Violence and Child Custody Bill (H.B. 1948), Assault Weapons Bill (S.B. 148), Victim Compensation Bill (S.B. 980) and Victim Privacy Bill (S.B.773) discussed in the previous article.

These bills are monitored on a regular basis by Tracy Wadsworth, Policy Analyst at MOVA. If you have any questions regarding these bills, she can be reached at (617) 727-5200. Current status of all bills can also be accessed through the Massachusetts General Court web site on the Internet. The address is: [www.magnet.state.ma.us/legis/ltsform.htm](http://www.magnet.state.ma.us/legis/ltsform.htm). This web site also contains a directory of State Senators and Representatives, committee directories, the text of the state budget, the state Constitution, and a guide to the legislative process.

# VICTIM ASSISTANCE CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of victim assistance contacts at the Office of the Attorney General. The main office number for all extensions listed below is (617) 727-2200; TTY- (617) 727-4765. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

<u>"Focus on Crime Victims"</u>	<u>Ext.</u>
Judith E. Beals, Editor.....	2551
Rasa Chiras, mailing list.....	2543
<u>Victim Compensation and Assistance Division</u>	
Judith E. Beals, Chief.....	2551
David B. Andrews, Deputy Program Director.....	2566
<u>Criminal Bureau</u>	
Kathy Morrissey, Victim Advocate.....	2856
Cheryl Watson, Victim Advocate.....	2565

## OTHER STATEWIDE VICTIM ASSISTANCE PROGRAMS

Massachusetts Office for Victim Assistance.....	(617) 727-5200
Massachusetts Parole Board.....	(617) 727-3271
Criminal History Systems Board.....	(617) 660-4690
U.S. Attorney's Office.....	(617) 223-4025

## DISTRICT ATTORNEY VICTIM/WITNESS PROGRAMS

Berkshire County.....	(413) 443-3500
Bristol County.....	(508) 997-0711
Cape and Islands.....	(508) 362-8103
Essex County.....	(508) 745-6610
Hampden County.....	(413) 748-1038
Middlesex County.....	(617) 494-4604
Norfolk County.....	(617) 329-5440
Northwestern District - Franklin and Hampshire Counties.....	(413) 586-5780
Plymouth County.....	(508) 584-8120
Suffolk County.....	(617) 725-8653
Worcester County.....	(508) 792-0214



Coming in the next edition of  
***“Focus on Crime Victims”***

- ✓ *Focus on Prevention: The Massachusetts Saving Lives Program*
- ✓ *Essex County District Attorney Kevin Burke's Juvenile Justice Community Collaborative Initiative*
- ✓ *Domestic Violence Updates*
- ✓ *...and more*

If you would like to submit an article to “*Focus on Crime Victims*,” or if you have suggestions for future articles, please contact Judith Beals, 727-2200, ext. 2551



***Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108***

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